

UNITED STATES)	
)	ORDER
V.)	
)	MOTIONS FOR SPECIAL RELIEF
KHALID SHEIKH MOHAMMED;)	D-010 AND D-011
WALID MUHAMMAD SALIH)	
MUBARAK BIN 'ATTASH;)	
RAMZI BIN AL SHIBH;)	
ALI ABDUL AZIZ ALI;)	1 JULY 2008
MUSTAFA AHMED AL HAWSAWI))	

1. The Commission has considered the motion for special relief submitted by the Detailed Counsel for Mr. Bin al Shibh (D-010), the Government response thereto and the Defense reply.
2. The Commission has also considered the joint motion for special relief (D-011) submitted at the request of Mr. Sheikh Mohammed and Mr. Bin Attash, and Detailed Defense Counsel for Mr. Bin al Shibh and Mr. al Hawsawi, and the Government response thereto.
3. Standby Defense Counsel for Mr. Ali also seeks to join in the motion in D-011 on behalf of Mr. Ali. The Commission notes that in the motion and a separate email, dated 23 June 2008, Standby Defense Counsel for Mr. Ali indicates that Mr. Ali has indicated his desire to withdraw his *pro se* representation request and proceed with representation by the Detailed Military Defense Counsel. Standby Defense Counsel also indicates, however, that "The Defense fully expects that Mr. al Baluchi (Mr. Ali) may seek to proceed *pro se* while in the courtroom and in the presence of three of the defendants. The Defense further expects that Mr. al Baluchi (Mr. Ali) will move between proceeding *pro se* and with representation throughout the trial." (Name of accused as reflected on the charge sheet added)
 - a. Although Mr. Ali would clearly be permitted to withdraw from his *pro se* status, this matter will need to be clarified in court, and with the understanding that he will not be permitted to change back and forth between represented and *pro se* status. Until such time that Mr. Ali clearly withdraws from his *pro se* status, Detailed Military Defense Counsel will continue to operate only the status of Standby Defense Counsel.
 - b. Accordingly, since Standby Defense Counsel makes no representation that his joining in the motion in D-011 is with the consent of Mr. Ali, Mr. Ali will not be viewed as being a part of the joint motion.

c. While there may be little or no practical consequence to this distinction, the Commission finds the distinction worthy of note so that all parties remain clear on status of counsel.

4. On 13 June 2008, in D-010, Mr. Bin al Shibh sought an enlargement of time as to the 13 June 2008 ordered deadline to file pleadings with regard to the issue raised by Detailed Defense Counsel concerning Mr. Bin al Shibh's competence to make a *pro se* representation election. In that same motion Mr. Bin al Shibh also requested a continuance of the hearing scheduled for this matter on 10 July 2008. (The motion also requests modification of all other ordered litigation milestones in this case.) In its response to D-010 the Government did not oppose "a reasonable extension of time for the Defense to file a motion on the issue of the accused's competency" but did oppose a modification that would delay the 10 July 2008 hearing date with regard to this matter.

5. In D-010 the Defense proffers several different bases for the requested relief. Only one requires discussion with regard to the resolution of this issue. In support of its motion the Defense claims that "the government has not provided discovery to the defense that is germane to this issue." In its response, the Government essentially concedes the crux of the Defense claim with regard to the status of the discovery issue. As of the date of the Government response (23 June 2008), the Government states that "The Prosecution will soon provide the medical records of the accused" to the Defense. The Government goes on to describe various efforts that are underway with regard to the discovery process and further identifies a number of areas of potential dispute between the Government and the Defense with regard to discovery. The Commission notes that an order was issued on 25 June 2008 directing the Commander, Joint Task Force–Guantanamo Bay, Cuba, to provide "any and all medical records...related to" Mr. Bin al Shibh to the Prosecution for release to Detailed Defense Counsel. Resolution of the discovery issues is beyond the scope of the Commission's consideration of this motion. It is clear however, that the discovery process in this case has not matured to the point where Defense may reasonably be expected to competently litigate the issue in question with regard to Mr. Bin al Shibh.

6. While the Commission will grant a continuance of the trial schedule concerning the mental capacity motion raised by Detailed Defense Counsel for Mr. Bin al Shibh, additional action is also required to move that issue toward resolution. RMC 909 governs the issue of capacity of an accused to stand trial by Military Commission. After referral of charges, the military judge may conduct a hearing to determine the mental capacity of an accused, either *sua sponte* or upon request of either party. RMC 909 contemplates that the results of an inquiry pursuant to RMC 706 is reasonably a part of the hearing conducted by the Military Judge. Accordingly, based on the matters addressed in D-010, the Commission has determined that an order directing an inquiry into the mental capacity of Mr. Bin al Shibh in accordance with RMC 706 is appropriate. An order to that effect will be issued concurrent with this ruling. The due date and hearing date of the Defense motion in this regard will be established in anticipation of the completion of that process.

7. With regard to the discovery matters noted by the Defense, it appears that while the Government is seeking to comply with portions of the Defense discovery request, the Government is also taking the position that the Defense request is too both too broad, as it pertains to this issue, and premature, because if the accused is granted *pro se* status Mr. Bin al Shibh might "take an entirely different approach to pre-trial discovery" and thereby presumably not request similar discovery on his own behalf. While the Commission reserves judgment on the viability of the Government suggestion, it is clear that, absent resolution of the discovery aspect of this matter between the parties, an additional hearing will be required following a proper and specific discovery motion by the Defense and a full response by the Government. Neither the Defense discovery request nor the references to discovery concerns in this motion constitute a discovery motion that places the matter properly before the Commission for resolution.

8. In D-011 the Defense requests a continuance in the form of modification of the entire litigation schedule. This request is premised on a number of bases, to include: the incomplete status of the discovery process; the volume of discovery provided thus far; the limited ability of counsel to meet with the represented accused and similarly limited ability of standby counsel and RMC 506(d) personnel (non counsel advisors) to meet with the *pro se* accused; the logistic challenges associated with the handling of classified material; the complexity of the case; the capital nature of the case; and the *pro se* status of several accused. In its response, the Government agrees that some adjustment of the established litigation schedule might be appropriate, but urges a shorter delay than requested by the Defense.

9. If operated properly, the Military Commission process should provide a workable trial system that can deal with the complex dynamics of a world wide theater of military operations. While this process might differ in some regards from trial procedures in other courts, its design does not contemplate a truncated process of justice. In this regard, some aspects of the litigation process might reasonably take longer than would be expected in other trial systems. In the Commission's view, the investment of a reasonable amount of additional time at this stage of the proceedings is a prudent course of action that will contribute greatly toward achievement of a just result, and not simply a conclusion of the process one way or the other.

10. While the Commission generally concurs in the appropriateness of granting the Defense requests for enlargement of time and continuance, the Government has also correctly identified a number of matters that can and should be addressed during the currently scheduled session. Accordingly, a number of modifications will be made to the previously ordered litigation schedule.

11. At the sessions, now scheduled to begin on 9 July 2008, the Commission intends to address the issue of what role, if any, perceived or actual intimidation between the several accused played or is playing in the *pro se* elections requested by the several accused. Concerns about this matter were expressly raised by the comments made by Major [REDACTED] during the last session of the Commission and impliedly by the email sent by LCDR [REDACTED] (via [REDACTED]) concerning "Notification of Acceptance of Counsel"

dated Monday 6/23/2008 1:50 PM. The Commission intends to discuss this matter with each of the accused on the record and in five separate sessions where each of the accused will appear outside the presence of the other accused.

12. In order to facilitate this process, the following schedule is provided:

1330 9 July 2008: Hearing with Mr. Al Hawasawi
1630 9 July 2008: Hearing with Mr. Ali
0830 10 July 2008: Hearing with Mr. Bin Al Shibh
1330 10 July 2008: Hearing with Mr. Bin Attash
1600 10 July 2008: Hearing with Mr. Sheikh Mohammed
0830 11 July 2008: Hearing with all accused if necessary

13. As part of the inquiry as described in paragraph 11, the Commission also intends to discuss the provisions of RMC 906(b)(7) concerning severance of charges in the event it appears that an accused or the Government is prejudiced by a joint or common trial.

14. With regard to the matter of severance, the Government is directed to prepare a brief addressing the Government's position on severance of the proceedings for one or more or all of the accused. This brief will be due to the Commission and opposing counsel and the *pro se* parties not later than 18 July 2008. If any accused wishes to provide a response to the Government brief, it shall be submitted not later than 25 July 2008. If any accused wishes to file a separate brief on the issue of severance which is not a response to the directed Government brief, it may do so. Such brief, if filed, will be due not later than 25 July 2008.

15. The following revised trial schedule is ordered in response to the continuance requests by the Defense. Pursuant to RMC 707, the Commission finds that these delays serve the interest of justice, and outweigh the interest of the public and the parties in abiding by the originally ordered litigation schedule. The Commission further finds that all delay associated with this modification is the responsibility of the Defense for the purposes of RMC 707 accountability.

- a. 18 July 2008: Brief regarding the severance issue due from the Government.
- b. 25 July 2008: Due date if any accused wishes to file a separate motion on the issue of severance which is not a response to the directed Government brief.
- c. 30 July 2008: Production completion date for all required and agreed upon requested discovery.
- d. 01 August 2008: Initial RMC 706 report due from the board to the Military Commissions Trial Judiciary Staff, trial counsel and the defense counsel for Mr. Bin al Shibh.

e. 08 August 2008: Full RMC 706 report due to the defense counsel for Mr. Bin al Shibh.

f. 14 August 2008: Severance Motion hearing in GTMO if necessary.

g. 15 August 2008: RMC 909 competency hearing with regard to Mr. Bin al Shibh.

h. 29 August 2008: Law Motions due to the military judge and opposing counsel and other *pro se* parties. In general, law motions are those which require no evidentiary hearing to determine. If any counsel/*pro se* party intends to submit more than ten (10) law motions, that counsel/*pro se* party will tell the military judge and opposing counsel/other *pro se* parties the total number of law motions which counsel intend to present NLT 1200 hours, 27 August. The military judge will advise counsel/other *pro se* parties of a revised schedule to present the motions.

Note 1: Motions will have as their underlying legal premise no more than one legal basis. If there is more than one legal basis, then there should be more than one motion. Law motions include motions relative to sentencing.

Note 2: Motions, response, and reply due dates are a No Later Than date. Counsel for both sides are advised that any motion, response, or reply which is ready for submission prior to the due date should be submitted when completed. The efficient and proper process of motion practice will NOT be enhanced by delivering multiple motions, responses, or replies to the Commission or opposing party at the last possible moment.

i. 10 September 2008: Discovery Motions Due

j. 24 September 2008 : Hearing on Law and Discovery Motions in GTMO

k. TBD: Evidentiary Motions. Evidentiary motions due to the military judge and opposing counsel/other *pro se* parties. In general, evidentiary motions are those which deal with the admission or exclusion of specific or general items or classes of evidence.

Note 1: See Notes 1 and 2 above.

Note 2: Defense witness requests associated with any motions should be submitted to the trial counsel in accordance with R.M.C. 703 simultaneously with the filing of the motion (or Defense response in the case of a Government motion) in question. The Government response to any witness request will be due within five days of the submission of the request. Any Defense motion for production of witnesses in conjunction with a motion will be due to the court and opposing counsel within five days of receipt of a denied witness request.

l. TBD: Hearing in GTMO re Evidentiary Motions.

m. TBD: Submission of requested group voir dire questions for the Military Commission Members.

Note: The military judge intends to conduct all group voir dire questioning of the members per R.M.C. 912. The military judge's group voir dire will take counsel's requested questions into account as appropriate. The military judge will also conduct the initial follow-up individual voir dire based on responses to the group questions. Counsel will be permitted to conduct additional follow-up voir dire.

n. TBD: Defense Requests for Government Assistance in Obtaining Witnesses for use on the merits. See R.M.C. 703.

Note: The Government response to any witness request will be due within five days of the submission of the request. Any Defense motion for production of witnesses in conjunction with a motion will be due to the court and opposing counsel within five days of receipt of a denied witness request.

o. TBD: Hearing re Witness Production Motions and any unresolved matters.

p. TBD: Assembly and Voir Dire for Panel Members.

q. TBD: Beginning of trial on the merits.

r. Counsel should direct their attention to the Rules of Court, RC 3, Motions Practice, and specifically Form 3-1, 3-2, and 3-3, for the procedures the Commission has established for this trial. All motions, responses and replies shall comport with the terms of RC 3.6 in terms of timeliness. Any request for extension of any response or reply deadline associated with this hearing will be submitted before the deadline for the reply or response.

s. Requests for deviations from the timelines for hearings or for submission of motions established by this order must be submitted not later than 20 days prior to the date established, except for law motions for which requests for deviations from the due date must be submitted within 7 days prior to the date established.

Ordered this 1st day of July 2008:

A handwritten signature in black ink, appearing to read 'R.H. Kohlmann', written over a horizontal line.

Ralph H. Kohlmann
Colonel, United States Marine Corps
Military Judge

UNITED STATES OF AMERICA

v.

KHALID SHEIKH MOHAMMED, WALID
MUHAMMAD SALIH MUBARAK BIN
'ATTASH, RAMZI BIN AL SHIBH, ALI
ABDUL AZIZ ALI, MUSTAFA AHMED
ADAM AL HAWSAWI

D-010B

Defense Reply

To Government Response to Defense Motion
for Special Relief for an Enlargement of Time
to File and a Continuance

30 June 2008

1. **Timeliness:** This Reply is timely filed within the deadline prescribed by the Commission in its email of 25 June 2008 (granting an extension of time to file the reply, now due NLT 1600, 30 June 2008).

2. **Additional Relevant Facts:**

a. On 10 June 2008, the defense submitted a request to the government for all records and documents related to the physical and mental health of Mr. bin al Shibh. *See* Defense Motion, D-010, Attachment A. On 23 June 2008, the defense received the government's written assurance that it will disclose all medical records of Mr. bin al Shibh to the defense and that it was arranging to have those records transported from GTMO and served on the defense. *See* Government Response, FN.1; ¶ 5.b; Attachment A. On 24 June 2008, the government requested the Military Judge sign an order that JTF-GTMO shall provide to the Prosecution, for release to the defense, all medical records in its possession, including mental health records. The Military Judge signed this order on 25 June 2008. [MJ 004]. The government has not yet provided any such records or documents.

b. On Monday 24 June 2008, the government provided to the defense a Medication Summary for Mr. bin al Shibh. [Attachment A]. This summary documents that Mr. bin al Shibh was taking [REDACTED] medications on the date of his arraignment, 5 June 2008, including: [REDACTED].

c. [REDACTED]

[REDACTED]

[Attachment C]

e. [REDACTED] . See [REDACTED]

f. [REDACTED] . See [REDACTED]

g. On 25 June 2008, the defense informed the government that defense counsel were in GTMO and were willing to receive the records ordered be provided directly from JTF-GTMO. [Attachment B]. On that same day, LT Federico personally delivered a copy of the Judge's Order, MJ 004, to LT [REDACTED], [REDACTED] Office, JTF-GTMO, and made the same offer. [REDACTED] indicated [REDACTED] would consult with the prosecution about this offer. Later that day, the government responded that the medical records must undergo a classification review before they can be released to the defense. [Attachment B]. On 26 June 2008, the defense requested the government expedite this review. [Attachment B].

[Note: For additional relevant facts, please see Attachment D – classified as Top Secret // SCI]

3. **Law and Argument:**

- I. **A CONTINUANCE IS REQUIRED BECAUSE, DESPITE DEFENSE REQUESTS SUBMITTED TO THE GOVERNMENT AND TO THE COMMISSION, THE GOVERNMENT HAS YET TO PROVIDE THE INFORMATION AND MATERIALS RELEVANT TO THE ISSUE OF COMPETENCY TO WAIVE RIGHT TO COUNSEL**

The government has averred that “The Prosecution will soon provide to the Defense the medical records of the accused, from the time of his capture in September 2002 until the present, that are currently known to the Prosecution.” *See* Government Response, D-010, ¶3. As of the date of this filing, the government has not turned over the records. The defense began seeking these records from the date of arraignment, nearly one month ago. On that date, defense counsel expressly requested the assistance of this Commission in obtaining an order, informing the Commission that JTF-GTMO required such an order to release medical records. The Military Judge required the defense to request any relief in writing. It was some three weeks later when the government, responding to a defense request for the records, finally sought its own order from this Commission. This delay cannot be attributed to the defense and must be attributed to the government: it cannot inure to the detriment of Mr. bin al Shibh by forcing a hearing on 10 July.

Although defense counsel were present in GTMO to retrieve the records on the very date the judge’s order was signed, the government refused to allow counsel to obtain the records, and used as a pretext for blocking production that it had to conduct a classification review of those records. What information may be contained in medical records that would require a classification review can only be left to speculation – these are not, after all, interrogation reports. Furthermore, as each defense counsel possess a [REDACTED] security clearance, it is incomprehensible why the records could not simply released, without any classification review. Regardless of the content of the records, counsel are authorized to see that information and are bound by applicable Protective Orders and the nondisclosure rules that govern any potential classified information contained in the medical records.

The government is fully aware that delay in the turn over of these records could likely moot the present motion, and thus it engages in dilatory production of commission-ordered

discovery. The defense fully expects that the government will conveniently submit some of the requested medical records immediately prior to the 10 July hearing, so as not to appear in before the commission without having offered some modicum of a response to judge's order. It is likely that the government delay in providing the records may be designed to prevent disclosure until all parties have already traveled to GTMO for the 10 July hearing. All parties are now scheduled to travel to GTMO on 7 July for the presently scheduled hearing. With its pretextual and deliberate delay in turning over medical records, the government will have wasted the time of the Commission and all the personnel attendant to any Commission hearing, not to mention wasted public resources by forcing all this personnel to travel to GTMO for such a hearing.

Time matters. The government casually dismisses the significance of providing the defense adequate time¹ when it states, "there is no basis for a continuance of the 10 July 2008 hearing" as "the medical records provided to the accused, in advance of the scheduled hearing, provide ample time for the Defense to request an R.M.C. 706 board should they choose to do so on the issue of competency." *See* Government Response, D-010, ¶6.i. Possession of medical records and information concerning a patient's history are a prerequisite to a mental health professional to even begin an evaluation. *See* Defense Motion, D-010, *Affidavit of* [REDACTED] Attachment H, ¶¶15-20.

Other than the one-page "Medication Summary" provided on 24 June 2008, the defense is in no different position than it was on 5 June 2008, the date of the arraignment. What has changed since 5 June is that the defense is now aware that the specific medications being administered to Mr. bin al Shibh are for treatment of severe mental and physical health

¹ Turning over documents on the eve of a hearing is becoming a troubling habit of the government. As it acknowledges, the defense did not receive any discovery until the afternoon of 3 June 2008 while in GTMO for the arraignment, despite charges being referred on 9 May 2008. Further, this information was turned over in a format that required more than one day delay for the defense to even be able to open the files on the CDs provided due to formatting problems.

problems.² “[REDACTED] of the [REDACTED] medications currently administered to Mr. Al Shibh [sic] are medically known to produce direct and significant impact on functioning, including adverse side effects that disrupt and compromise physical and mental health.” *See Affidavit of [REDACTED]*, **Attachment C**, pg. 7. This information raises more questions regarding competency that were even present on 5 June, and begs for an extension of time to vet the issues now presented. As the attached declaration demonstrates, a medical evaluation is mandated:

In order to assess the medical necessity and efficacy of these medications and their adverse side effects, it is necessary to conduct an independent, thorough, and reliable review and assessment of medical symptoms, prior history, and current functioning. It is critical for such a review to include complete medical records, including prior medication regimes, the indicated medical necessity for the administration of drugs, physician notes, nurse notes, medication charts, laboratory testing, prior psychiatric and psychological testing, narrative reports and other records relating to health care. Without all this information and such an assessment, it is impossible to assess the medical necessity for the current course of Mr. Al Shibh’s chemotherapy or to enable him to make an informed, knowing, and intelligent decision about any course of action available to him.

See Affidavit of [REDACTED], **Attachment C**, pgs. 9-10.

The Supreme Court itself has acknowledged that “[m]ental illness itself is not a unitary concept. It varies in degree. It can vary over time. It interferes with an individual’s functioning at different times in different ways.” *Indiana v. Edwards*, 554 U.S. ___, slip op. 10 (2008)³. The defense is not in a position to address the issue of Mr. bin al Shibh’s mental illness without being provided the essential discovery from the government *and the time* to have qualified professionals assist the defense in this endeavor.

Finally, the government cannot hide behind a classification review as an excuse for further delay of providing these records to the defense. *See Government Response*, D-010, ¶5.b.

² The defense references **Attachment D** as additional information relevant to this point.

³ As noted therein, the Supreme Court had not yet issued its opinion in *Edwards* at the time the defense filed its Motion, D-010. Also of note about that case is that the respondent, [REDACTED], suffered from a “schizophrenic illness.” *See Edwards*, slip op. 2. This is the same illness that [REDACTED], the medication being administered to Mr. bin al Shibh, is supposed to treat.

The adversarial party to Mr. bin al Shibh is the “United States of America.” That is, not simply the Prosecutors, but the entire executive branch of the United States government. It is one government. All delayed incurred by any agency of the Executive branch in conducting this classification review must be imputed to the entire government. The Founders decided to vest Executive authority in one person rather than several. *See Clinton v. Jones*, 520 U.S. 681, 712 (1997). “They did so in order to focus, rather than to spread, Executive responsibility thereby facilitating accountability. They also sought to encourage energetic, vigorous, decisive, and speedy execution of the laws by placing in the hands of a single, constitutionally indispensable, individual the ultimate authority that, in respect to the other branches, the Constitution divides among many.” *Id.*

II. A CONTINUANCE IS REQUIRED BECAUSE THE GOVERNMENT HAS RESPONDED IT WILL NOT PROVIDE DISCOVERY THAT IS RELEVANT AND MATERIAL TO THE PRESENT ISSUE OF COMPETENCY TO WAIVE RIGHT TO COUNSEL

“[T]he Constitution permits a State to limit the defendant’s self-representation right by insisting upon representation by counsel at trial – on the ground that the defendant lacks the mental capacity to conduct his trial defense unless represented.” *Edwards*, slip op. 8. The Military Judge cannot accept an accused’s waiver of right to counsel unless the Military Judge finds the accused competent to make such a waiver. *See* R.M.C. 506(c).

The government denied the defense discovery request for records relating to information about interrogation methods and conditions employed against Mr. bin al Shibh by agents of the United States. *See* Government Response, D-010, ¶5.c. “There is simply no need to disclose all of the documents requested by the Defense that are unrelated (and therefore not relevant) to the issue presently before the military commission.” *See* Government Response, D-010, ¶6.d. The government claims the defense has not shown the requested information to be relevant and

material to its case. *See* R.M.C. 701, *United States v. Yunis*, 867 F.2d. 617, 621-22 (D.C. Cir. 1989). In *Yunis*, the Court defined “material to the preparation of the defense” as “helpful to the defense of an accused.” *Id.* at 622.

Any plausible basis for the government’s position that the materials the defense seeks are not discoverable is wholly vitiated by the facts contained in the classified summary,

Attachment D. There can be no doubt that detailed documentation, records, and information concerning the treatment, care, and conditions of Mr. bin al Shibh while in the custody of the United States government are “helpful to the defense” on the very issue of competency, just as there can be no doubt that the treatment of Mr. bin al Shibh by agents of the United States government has directly contributed to his present mental state. *See Affidavit of* [REDACTED],

Attachment C, pgs. 9-10 (“Unless the possibility of ill-treatment and torture that has been publicly reported as experienced by persons similarly situated as Mr. al Shibh can be clinically ruled out, a medical evaluation of Mr. al Shibh should follow the protocols for physicians and mental health professionals that is outlined in the Istanbul Protocol”).

The government’s limited and narrowed view of its legal obligation to produce the requested medical records forces the Commission’s hand, compelling it to provide the defense the relief it seeks: Time. The defense must be permitted time to seek further relief in motions to compel production of discovery of the information the government has deemed not relevant and material. On the contrary, this information is in fact critical to the competency issue presently before the Commission. Being subject “to torture or cruel, inhumane, and degrading treatment can cause severe and lasting physical and psychological harm.” *See* Defense Motion D-010, page 11, *see also* Defense Motion D-010, Attachment H.

The government further responds that its only present discovery obligation is to provide medical records and that “denial of certain items at *this point in time* in now way precludes the

Prosecution revisiting aspects of the request at a later point in time.” Government Response, D-010, ¶6.e. “The accused has elected to represent himself in these proceedings.” *Id.*, ¶6.c. “The Military Judge must first make a determination on the issue whether to grant the accused’s request to represent himself” and “the unrelated discovery requested by the Defense can always be renewed by the accused himself.” *Id.*, ¶6.d.

Aside from the speciousness of the government’s contentions, the single and most troubling conclusion one can draw from the government’s response is that it is desperately attempting to avoid its discovery obligations in the hope that Mr. bin al Shibh will be representing himself after 10 July, and that he will thereafter not have the knowledge, resources, or desire to renew discovery requests. This conclusion is easily reached when one considers the treatment Mr. bin al Shibh has endured at the hands of agents of the United States government. *See Attachment D*. The United States stands to incur significant embarrassment if the details of this treatment become known. *See, e.g. Boumediene v. Bush*, 553 U.S. ___, slip op. 4 (2008)(“[E]ven when the military has evidence that it can bring forward, it is often foolhardy to release that evidence to the attorneys representing our enemies.”)(Scalia, J., dissenting). Public embarrassment is not a basis for pushing forward a proceeding that could lead to a person’s death without due process.

III. MR. BIN AL SHIBH WILL SUFFER ENORMOUS PREJUDICE IF ADEQUATE TIME IS NOT PROVIDED FOR A FULL ANALYSIS OF THE COMPETENCY ISSUE

“[P]roceedings must not only be fair, they must ‘appear to be fair to all who observe them.’” *Edwards*, slip op. 11, citing *Wheat v. United States*, 486 U.S. 153, 160 (1988). The consequences of a rushed judgment on Mr. bin al Shibh’s counsel election are enormous. If the Military Judge denies the defense its requested relief, the likely result is that a mentally ill man

may represent himself in a trial where he faces the death penalty, without even a cursory determination as to competency based upon medical evidence. “No trial can be fair that leaves the defense to a man who is insane, unaided by counsel, and who by reason of his mental condition stands helpless and alone before the court.” *Edwards*, slip op. 12, *quoting Massey v. Moore*, 328 U.S. 105, 108 (1954).

“Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of the qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.” *Woodson v. North Carolina*, 428 U.S. 280, 304-305 (1976). The Supreme Court has recognized that this need for reliability heightens the procedural protections that must be afforded. *See Gardner v. Florida*, 430 U.S. 349 (1977)(striking down a procedure that permitted the court to consider confidential information at capital sentencing); *Simmons v. South Carolina*, 512 U.S. 154 (1994)(holding that jurors must be informed that life sentence means life without parole); *Morgan v. Illinois*, 504 U.S. 719 (1992)(requiring the court to elicit potential juror views on capital punishment); *Lockett v. Ohio*, 438 U.S. 586 (1978)(holding jurors must be permitted to consider evidence in mitigation). That same heightened standard must apply to Mr. bin al Shibh.

The government’s position is that Mr. bin al Shibh is not prejudiced in any way by not being granted an enlargement of time or a continuance of the 10 July hearing so that the defense may analyze the impact of the recent decision in *Indiana v. Edwards*. *See* Government Response, D-010, ¶6.k. The defense does not require more time to analyze the decision, it requires more time to *apply* the decision to the facts (as appropriate discovery will reveal them) and to the competency issue presently before the Commission.

4. **Request for Oral Argument:** The defense still does not request oral argument, unless there is a dispute as to any material fact necessary for resolution of the issue. If such a dispute were to arise, the defense reserves the right to request production of witnesses and to request a hearing and oral argument.

5. **Attachments:**

A. Medication Summary (FOUO) (1 pg.)

B. Emails between LT Federico and Mr. Clayton Trivett, dated 25 June 2008 (2 pgs)

C. Affidavit of [REDACTED]

D. Additional Facts, [REDACTED]

Respectfully submitted,

By: 

CDR SUZANNE LACHELIER, JAGC, USNR
LT RICHARD E.N. FEDERICO, JAGC, USN
Detailed Defense Counsels for
Ramzi bin al Shibh
Office of the Chief Defense Counsel
Office of Military Commissions
[REDACTED]

ATTACHMENT A

CLASSIFICATION: [REDACTED]

TRACKING NUMBER: [REDACTED]

ISN: 10013

Medication	TYPE	First Prescribed	How long taking	Taken 5 June 08?
[REDACTED]				

ATTACHMENT B

Federico, Richard, LT, DoD OGC

From: Federico, Richard E LT USSOUTHCOM JTFGTMO

Sent: Wednesday, June 25, 2008 6:39 PM

To: [REDACTED]

Cc: [REDACTED]

Subject: RE: U.S. v Mohammed, et al-Special Request for Relief-Prosecution's proposed order regarding medical records of Ramzi Bin al Shibh

Got it Clay, thank you.

FYI, this afternoon I gave a copy of the Judge's order to LT [REDACTED] from the SJA office, JTF GTMO and informed her that I had made the offer to you that we were willing to receive the records directly from the JTF. As it stands, we will stand by for the classification review.

Please also note that each day of delay in getting us the records is yet another day that we are unable to begin even a cursory review or analysis as to the competency issue. As such, any sense of urgency that could be communicated to the equity owner(s) to expedite the review would be greatly appreciated.

Very Respectfully,

Rich Federico
LT JAGC USN
OMC Defense

-----Original Message-----

From: Claytogg [mailto:[REDACTED]]
Sent: Wednesday, June 25, 2008 1:25 PM
To: Federico, Richard E LT USSOUTHCOM JTFGTMO

Subject: RE: U.S. v Mohammed, et al-Special Request for Relief-Prosecution's proposed order regarding medical records of Ramzi Bin al Shibh

LT Federico,

Thanks for the offer, unfortunately, the medical records have to undergo a classification review process back here prior to release to you. We anticipate that they will be sent from GTMO this Saturday and we will be able to turn them over sometime next week. I am working hard to get these records to you as soon as possible.

v/r
Clay

-----Original Message-----

From: Federico, Richard E LT USSOUTHCOM JTFGTMO
[mailto:[REDACTED]]
Sent: Wednesday, June 25, 2008 10:26 AM
To: [REDACTED]

[REDACTED]

Subject: RE: U.S. v Mohammed, et al-Special Request for Relief-Prosecution's proposed order regarding medical records of Ramzi Bin al Shibh
Importance: High

Mr. Trivett,

In the Government response to D-010, filed on Tuesday, 24 June 2008 (filed at 1631 on 3 June), it states in FN.1 that "the Prosecution is currently arranging to have those records transported from GTMO and served on the Defense." (referring to a complete copy of Mr. Bin al Shibh's medical records). Both CDR Lachelier and I are in GTMO. We are more than willing to receive the records directly from the JTF today or tomorrow morning and will sign also sign a receipt of discovery, as needed. Please advise ASAP if this is a possibility as we will be at the JTF this afternoon and tomorrow morning.

Very Respectfully,

Rich Federico
LT JAGC USN
OMC Defense

-----Original Message-----

From: Claytogg [mailto:[REDACTED]]
Sent: Tuesday, June 24, 2008 5:23 PM
To: 'Sowder, William, LTC, DoD OGC'

[REDACTED]

Subject: U.S. v Mohammed, et al-Special Request for Relief-Prosecution's proposed order regarding medical records of Ramzi Bin al Shibh

LTC [REDACTED]

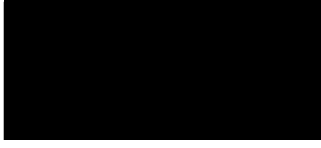
1. As stated in the Prosecution response to D010, the Prosecution has been advised by the Staff Judge Advocate for Joint Task Force - Guantanamo Bay Cuba that JTF-GTMO requires a court order from the Military Judge prior to releasing any psychological or psychiatric records of any detainee held at Guantanamo Bay.

2. In light of that requirement, the Prosecution respectfully requests the Military Judge sign the attached order to facilitate the Defense's review of all relevant medical records for Ramzi bin al Shibh in advance of the 10 July 2008 hearing.

3. The Defense for Ramzi Bin al Shibh has specifically requested these records.

v/r

ATTACHMENT C

Affidavit of 

I, Pablo Stewart, declare as follows:

I am a physician licensed to practice in California and Hawaii with a specialty in clinical and forensic psychiatry.

I hold a Bachelor of Science Degree from the United States Naval Academy, Annapolis, Maryland, which I obtained in 1973, with a major in chemistry. I received my Doctor of Medicine Degree from the University of California, San Francisco, School of Medicine in 1982. In 1985, I received the Mead-Johnson American Psychiatric Association Fellowship for demonstrated commitment to public sector psychiatry and was selected as the Outstanding Psychiatric Resident by the graduating class of the University of California, San Francisco, School of Medicine. In 1985-1986, I was the Chief Resident, Department of Psychiatry, University of California, San Francisco, General Hospital and had direct clinical supervision of seven psychiatric residents and three to six medical students.

Throughout my professional career, I have had extensive clinical, research, and academic experience in the diagnosis, treatment, and prevention of substance abuse and related disorders, including diagnostic, treatment, and community care programs for persons with Major Depressive Disorder and Posttraumatic Stress Disorder, the management of patients with dual diagnoses and the application of psychotropic medication, and the history and use of psychotropic medications in institutionalized populations. I have designed and taught courses on the protocol for identifying and treating psychiatric patients with substance abuse histories and have supervised psychiatric residents in teaching hospitals. I have worked closely with local, state and federal governmental bodies to design and present educational programs about psychiatry, substance abuse, and preventative medicine.

Page 1 of 10

I have presented numerous papers before mental health professionals, prosecutors and defense attorneys, probation officers, and judges, and have published in professional and peer-reviewed journals on topics including forensic psychiatry, dual diagnosis, mental illness, alcohol and drug abuse, and the treatment of mental illness and substance abuse. These presentations and publications include: "Cultural Considerations in Working with the Latino Patient" (2002); "Psychiatric Complications of the Methamphetamine Abuser" (2001); "The Assessment, Diagnosis, and Treatment of the Patient with Multiple Disorders" (2001); "Indicators for the Use of the New Antipsychotics" (1997); "The Dual-Diagnosed Client" (2000); "Assessing the Needs of the entire Patient: Empathy at its Finest" (2000); "Alcoholism: Practical Approaches to Diagnosis and Treatment" (1999); "Criminal Justice and Substance Abuse" (1999); "Alcoholism: Practical Approaches to Diagnosis and Treatment" (1999); "Impulse Control Disorders" (1999); "Major Depressive Disorder" (1999); "Substance Abuse and Major Depressive Disorder" (1999); "Mental Health Aspects of Diminished Capacity and Competency" (2008); "Psychiatric Crises In The Primary Care Setting" (2001); "Attention Deficit Disorder, Substance Abuse, Psychiatric Disorders and Related Issues" (1994); and "Psychotic Conditions and Substance Use: Prescribing Guidelines and Other Treatment Issues" (1991).

I am currently a Diplomat of, and have served as an Examiner for, the American Board of Psychiatry and Neurology. I am active in several professional associations and have served as the President, Secretary-Treasurer, and Councilor-At-Large of the Alumni-Faculty Association, University of California, San Francisco, School of Medicine; Vice President of the Northern California Area, Alumni-Faculty Association, University of California, San Francisco; and Associate

Clinical Member of the American Group Psychotherapy Association.

Since 1986, I have held academic appointments as Clinical Professor, Associate Clinical Professor, Assistant Clinical Professor, and Clinical Instructor in the Department of Psychiatry, University of California, San Francisco, School of Medicine. I received the Henry J. Kaiser Award for Excellence in Teaching in 1987 and was selected by the graduating class of the University of California, San Francisco, School of Medicine as the outstanding psychiatric faculty member for the academic years 1988-1989, 1990-1991, and 1994-1995. I designed, planned, and taught "Drug and Alcohol Abuse" and "Alcoholism," one-unit courses covering major aspects of drug and alcohol abuse; supervised fourth year medical students in the care of dually diagnosed patients at the Psychiatric Continuity Clinic, Haight Ashbury Free Clinic; facilitated a weekly psychiatric intern seminar on "Psychiatric Aspects of Medicine," and lectured on addictionology and substance abuse to the School of Pharmacy, University of California, San Francisco.

I have held numerous positions with responsibility for ensuring the quality of clinical services provided by inpatient and community based programs. From 1997 to 1998, I was Director of Clinical Services for San Francisco Target Cities Project. I also served as Medical Director of the Comprehensive Homeless Center, Department of Veterans Affairs Medical Center in San Francisco, where I had overall responsibility for the medical and psychiatric services at the Homeless Center; Chief of the Intensive Psychiatric Community Care Program, Department of Veterans Affairs Medical Center in San Francisco, a community-based case management program; Chief of the Substance Abuse Inpatient Unit, Department of Veterans Affairs Medical Center in San Francisco, where I had overall clinical and administrative responsibilities for the unit; and Psychiatrist, Substance Abuse

Inpatient Unit, where I provided consultation to the Medical/Surgical Units regarding patients with substance abuse problems. I served as a Physician Specialist to the Westside Crisis Center, San Francisco, from 1984 to 1987, and to the Mission Mental Health Crisis Center from 1983 to 1984. I was the Chief of Psychiatric Services at Haight Ashbury Free Clinic, a position I held from 1991 to 2006.

From 1988 to 1989, I was Director, Forensic Psychiatric Services for the City and County of San Francisco, where I had administrative and clinical responsibilities for psychiatric services provided to the inmate population of San Francisco. My duties included direct clinical and administrative responsibility for the Jail Psychiatric Services and the Forensic Unit at San Francisco General Hospital. From 1986 to 1990, I was Senior Attending Psychiatrist, Forensic Unit, University of California, San Francisco, General Hospital where I was responsible for a twelve-bed maximum-security psychiatric ward. My duties in that position included advising the San Francisco City Attorney on issues pertaining to forensic psychiatry.

I served as psychiatric consultant to the Institute on Crime, Justice and Corrections at George Washington University, which monitored the agreement between the United States and the State of Georgia to improve the quality of that State's juvenile justice facilities, critical mental health, medical and educational services and treatment programs. I have also served as a Technical Assistance Consultant to the Center for Substance Abuse Treatment, Substance Abuse and Mental Health Services Administration Department of Health and Human Services; and as Psychiatric Consultant to the San Francisco and Hawaii Drug Courts. I was qualified as a Psychiatric Expert witness in federal court in *Madrid v. Gomez*, concerning the implementation of constitutionally mandated psychiatric care at Pelican Bay State Prison. A true and complete copy of my curriculum vitae is attached hereto.

At the request of counsel for Ramzi bin Al Shibh, I have reviewed a summary of medications currently being administered to Mr. Al Shibh by officials at Guantanamo Detention facility, Guantanamo, Cuba, to determine possible effects of the medications on Mr. Al Shibh's mental and physical functioning in order to determine the medical necessity for the medications, whether they are being voluntarily administered, and their potential affect on Mr. Bin Al Shibh's competency to knowingly and effectively waive his right to counsel, and conduct his own defense. Because I do not have the required security clearance, I have been informed that the rules of the Military Commission prohibit counsel from providing

me with the kinds of information physicians normally rely upon in reaching an opinion about the medical necessity and efficacy of a medication regimen and whether it is being administered with informed patient consent. Counsel have explained that routine and necessary medical information, such as [REDACTED]

[REDACTED] are classified and not available to me for review.

According to the information provided me, which involves only [REDACTED] medications being administered, their dosages and the length of time they have been administered, Mr. Al Shibh is receiving the following medication regimen:

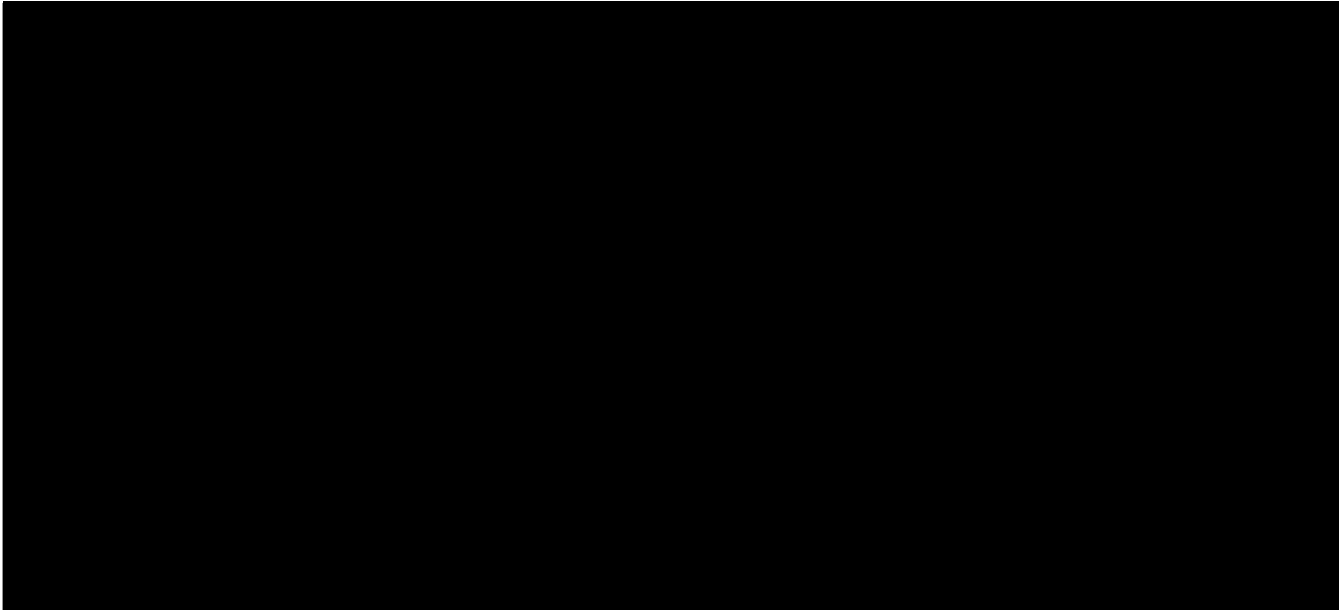
[REDACTED]

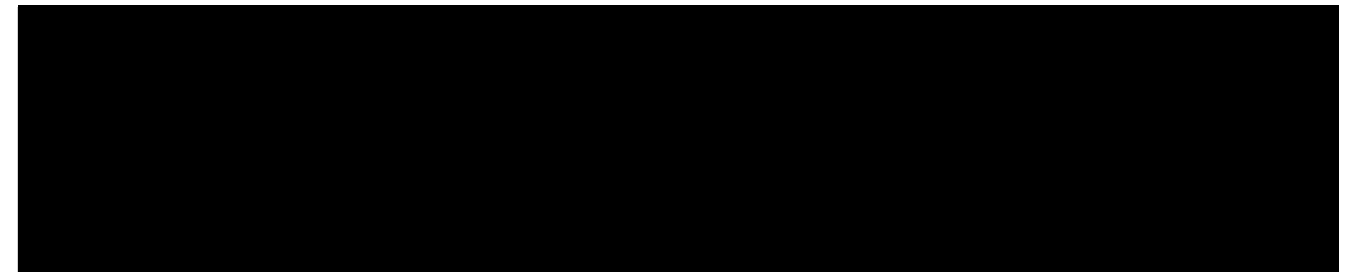
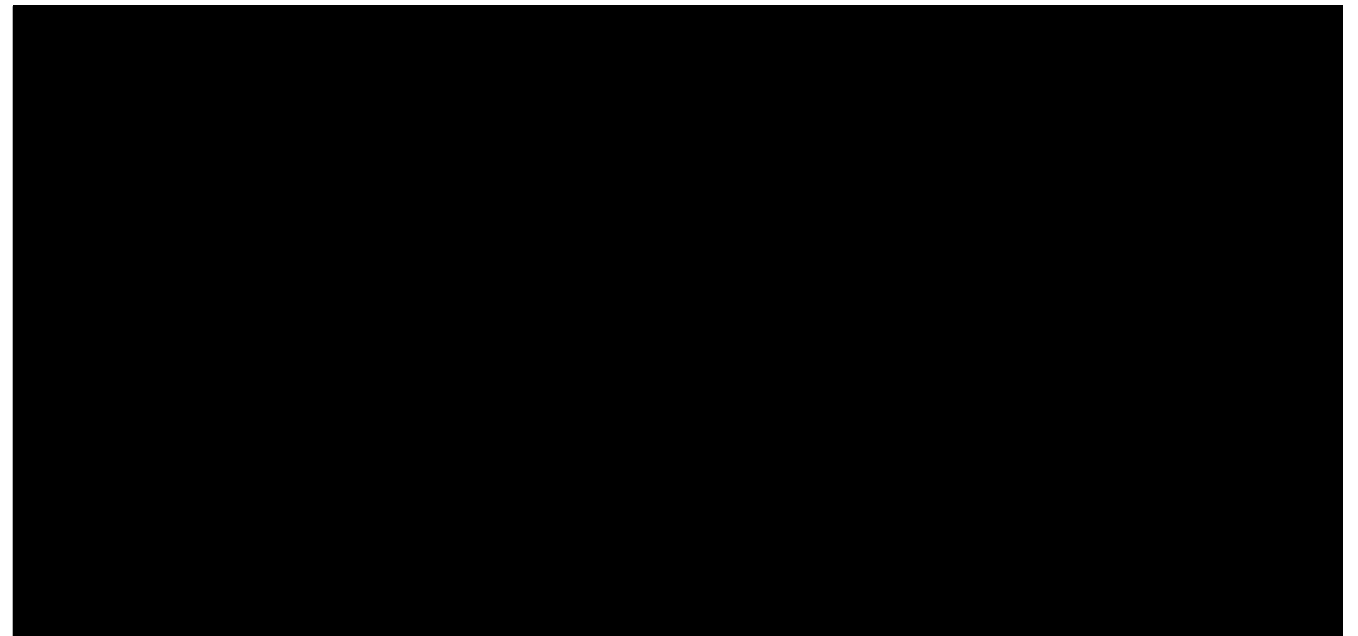
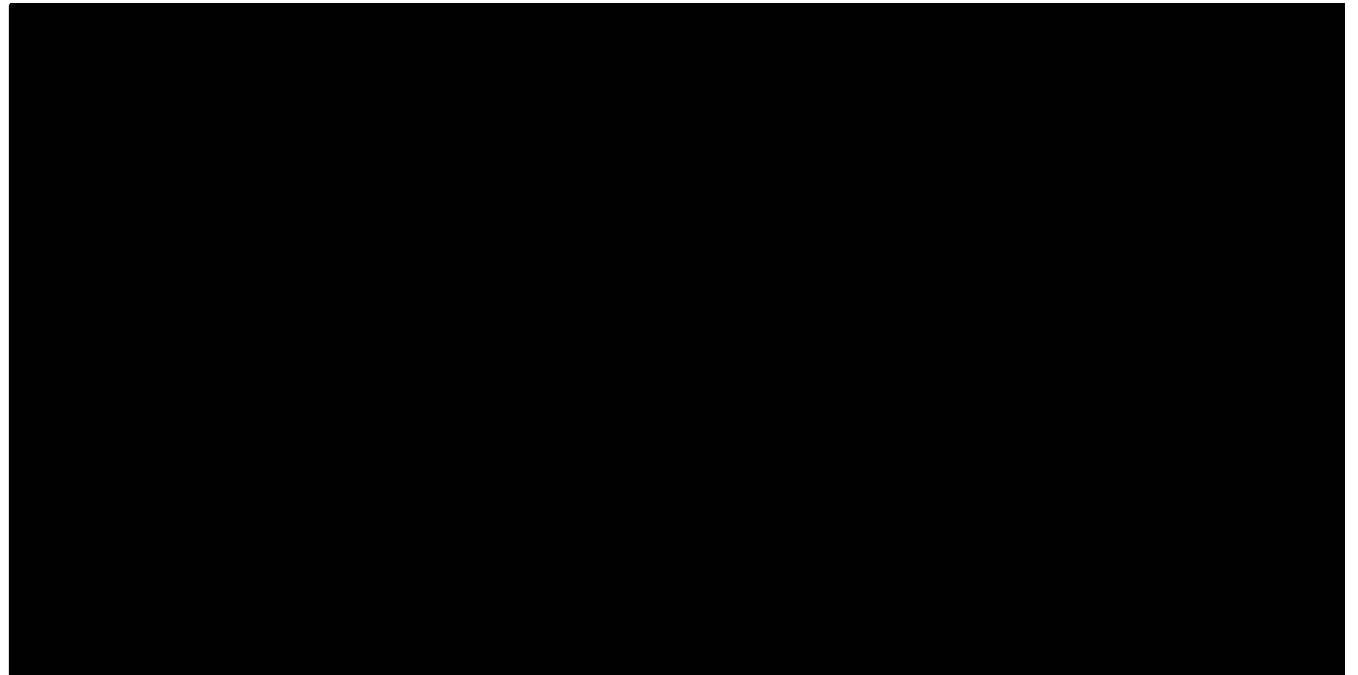
Although counsel are unable to answer my questions about Mr. Al Shibh's medical and social history, public records provide some relevant information.

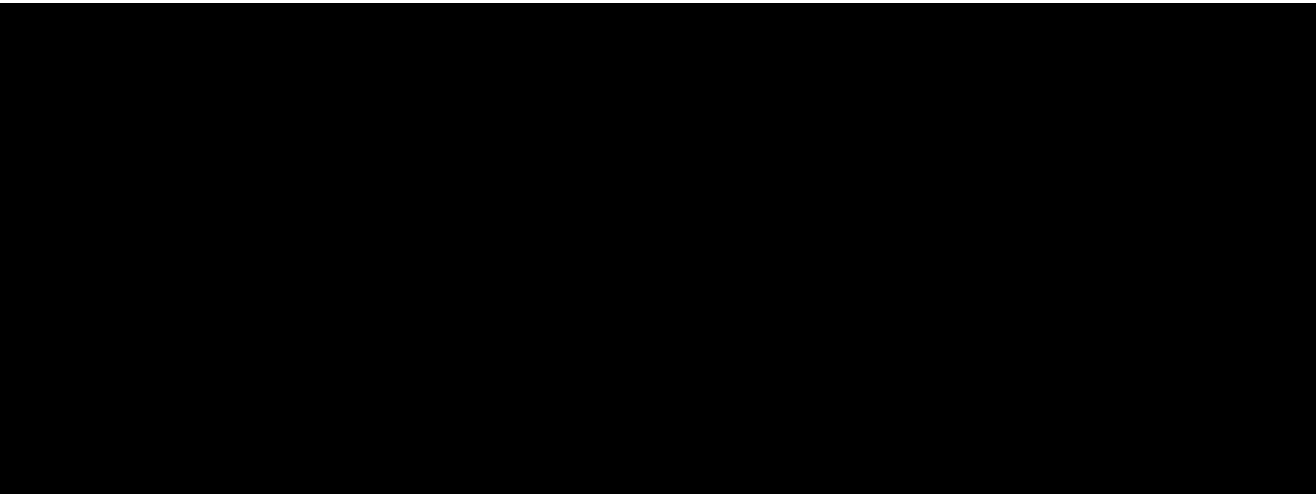
According to public documents and other nonclassified information, Mr. Al Shibh was shackled to the floor during a recent Guantanamo Military Commission

hearing, a circumstance that was explained to Mr. Al Shibh's counsel as necessitated by the fact of his medication regime. Mr. Al Shibh's eyes appeared to be bulging and bloodshot. Prior to his arrival at Guantanamo, he was held for four years by the CIA at undisclosed prisons and was interrogated 141 times. Although no specific details have been released by the Guantanamo Military Commission about his treatment during detention, human rights organizations, media, and legislative hearings have reported frequent maltreatment and even torture of detainees held in secret prisons by U.S. authorities. Media reports state Mr. Al-Shibh is a 36 year old citizen of Yemen.

██████ of the ██████ medications currently administered to Mr. Al Shibh are medically known to produce direct and significant impact on functioning, including adverse side effects that disrupt and compromise physical and mental health.





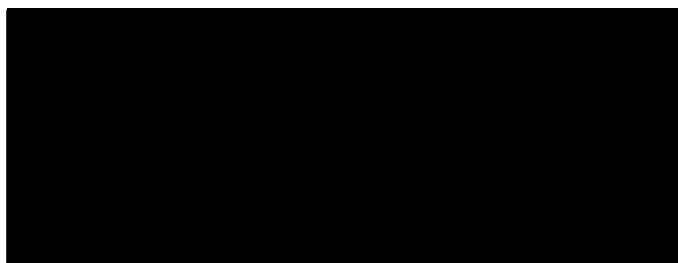


In order to assess the medical necessity and efficacy of these medications and their adverse side effects, it is necessary to conduct an independent, thorough, and reliable review and assessment of medical systems, prior history, and current functioning. It is crucial for such a review to include complete medical records including prior medication regimes, the indicated medical necessity for the

administration of drugs, physician notes, nurse notes, medication charts, laboratory testing, prior psychiatric and psychological evaluation and testing, narrative reports and any other records relating to health care. Without all this information and such an assessment, it is impossible to assess the medical necessity for the current course of Mr. Al Shibh's chemotherapy or to enable him to make an informed, knowing, and intelligent decision about any course of action available to him.

Unless the possibility of ill-treatment and torture that has been publicly reported as experienced by persons similarly situated as Mr. Al Shibh can be clinically ruled out, a medical evaluation of Mr. Al Shibh should follow the protocol for physicians and mental health professionals that is outlined in the Istanbul Protocol, a copy of which is attached to this declaration. It is necessary to follow the standard of care afforded individuals who have been tortured.

I declare under the penalty of perjury and laws of the United States that the foregoing is true and correct this 28th day of June, 2008.



CURRICULUM VITAE



EDUCATION:

University of California School of Medicine, San Francisco, California, M.D., 1982

United States Naval Academy Annapolis, MD, B.S. 1973, Major: Chemistry

LICENSURE:

California Medical License #GO50899
Hawai'i Medical License #MD11784
Federal Drug Enforcement Agency #BS0546981
Diplomat in Psychiatry, American Board of Psychiatry and Neurology, Certificate #32564

ACADEMIC APPOINTMENTS:

September 2006-
Present

Academic Appointment: Clinical Professor, Department of Psychiatry, University of California, San Francisco, School of Medicine.

July 1995 -
Present

Academic Appointment: Associate Clinical Professor, Department of Psychiatry, University of California, San Francisco, School of Medicine.

August 1989 -
June 1995

Academic Appointment: Assistant Clinical Professor, Department of Psychiatry, University of California, San Francisco, School of Medicine.

August 1986 -
July 1989

Academic Appointment: Clinical Instructor, Department of Psychiatry, University of California, San Francisco, School of Medicine.

EMPLOYMENT:

December 1996-
Present

Psychiatric Consultant
Provide consultation to governmental and private agencies on a variety of psychiatric, forensic, substance abuse and organizational issues. (Client list available upon request).

January 1997 -
September 1998

Director of Clinical Services, San Francisco Target Cities Project. Overall responsibility for ensuring the quality of the clinical services provided by the various departments of the project including the Central Intake Unit, the ACCESS Project and the San Francisco Drug Court. Also responsible for providing clinical in-service training's for the staff of the Project and community agencies that requested technical assistance.

February 1996 -
November 1996

Medical Director, Comprehensive Homeless Center, Department of Veterans Affairs Medical Center, San Francisco. Overall responsibility for the medical and psychiatric services at the Homeless Center.

March 1995 -
January 1996

Chief, Intensive Psychiatric Community Care Program (IPCC) Department of Veterans Affairs Medical Center, San Francisco. Overall clinical/administrative responsibility for the IPCC, a community based case management program. Duties also include medical/psychiatric consultation to Veteran Comprehensive Homeless Center. This is a social work managed program that provides comprehensive social services to homeless veterans.

April 1991 -
February 1995

Chief, Substance Abuse Inpatient Unit, (SAIU), Department of Veterans Affairs Medical Center, San Francisco. Overall clinical/administrative responsibility for SAIU.

September 1990 -
March 1991

Psychiatrist, Substance Abuse Inpatient Unit, Veterans Affairs Medical Center, San Francisco. Clinical responsibility for patients admitted to SAIU. Provide consultation to the Medical/Surgical Units regarding patients with substance abuse issues.

August 1988 -
December 1989

Director, Forensic Psychiatric Services, City and County of San Francisco. Administrative and clinical responsibility for psychiatric services provided to the inmate population of San Francisco. Duties included direct clinical and administrative responsibility for the Jail Psychiatric Services and the Forensic Unit at San Francisco General Hospital.

July 1986 -
August 1990

Senior Attending Psychiatrist, Forensic Unit, University of California, San Francisco General Hospital. Administrative and clinical responsibility for a 12-bed, maximum-security psychiatric ward. Clinical supervision for psychiatric residents, postdoctoral psychology fellows and medical students assigned to the ward. Liaison with Jail Psychiatric Services, City and County of San Francisco. Advise San Francisco City Attorney on issues pertaining to forensic psychiatry.

July 1985 June 1986	<u>Chief Resident, Department of Psychiatry, University of California San Francisco General Hospital.</u> Team leader of the Latino-focus inpatient treatment team (involving 10-12 patients with bicultural/bilingual issues); direct clinical supervision of 7 psychiatric residents and 3-6 medical students; organized weekly departmental Grand Rounds; administered and supervised departmental residents' call schedule; psychiatric consultant to hospital general medical clinic; assistant coordinator of medical student education; group seminar leader for introduction to clinical psychiatric course for UCSF second year medical students.
July 1984 - March 1987	<u>Physician Specialist, Westside Crisis Center, San Francisco, CA.</u> Responsibility for Crisis Center operations during assigned shifts; admitting privileges at Mount Zion Hospital. Provided psychiatric consultation for the patients admitted to Mount Zion Hospital when requested.
April 1984 - July 1985	<u>Psychiatric Consultant, Marin Alternative Treatment, (ACT).</u> Provided medical and psychiatric evaluation and treatment of residential drug and alcohol clients; consultant to staff concerning medical/psychiatric issues.
August 1983 - November 1984	<u>Physician Specialist, Mission Mental Health Crisis Center, San Francisco, CA.</u> Clinical responsibility for Crisis Center clients; consultant to staff concerning medical/psychiatric issues.
July 1982- July 1985	<u>Psychiatric Resident, University of California, San Francisco.</u> Primary Therapist and Medical Consultant for the adult inpatient units at San Francisco General Hospital and San Francisco Veterans Affairs Medical Center; Medical Coordinator/Primary Therapist - Alcohol Inpatient Unit and Substance Abuse Clinic at San Francisco Veterans Affairs Medical Center; Outpatient Adult/Child Psychotherapist; Psychiatric Consultant - Adult Day Treatment Center - San Francisco Veterans Affairs Medical Center; Primary Therapist and Medical Consultant - San Francisco General Hospital Psychiatric Emergency Services; Psychiatric Consultant, Inpatient Medical/Surgical Units - San Francisco General Hospital.
June 1973 - July 1978	<u>Infantry Officer - United States Marine Corps.</u> Rifle Platoon Commander; Anti-tank Platoon Commander; 81mm Mortar Platoon Commander; Rifle Company Executive Officer; Rifle Company Commander; Assistant Battalion Operations Officer; Embarkation Officer; Recruitment Officer; Drug, Alcohol and Human Relations Counselor; Parachutist and Scuba Diver; Commander of a Vietnamese Refugee Camp. Received an Honorable Discharge. Highest rank attained was Captain.

HONORS AND AWARDS:

- June 1995 Selected by the graduating class of the University of California, San Francisco, School of Medicine as the outstanding psychiatric faculty member for the academic year 1994/1995.
- June 1993 Selected by the class of 1996, University of California, San Francisco, School of Medicine as outstanding lecturer, academic year 1992/1993.
- May 1993 Elected to Membership of Medical Honor Society, AOA, by the AOA Member of the 1993 Graduating Class of the University of California, San Francisco, School of Medicine.
- May 1991 Selected by the graduating class of the University of California, San Francisco, School of Medicine as the outstanding psychiatric faculty member for the academic year 1990-1991.
- May 1990 Selected by the graduating class of the University of California, San Francisco, School of Medicine as the outstanding psychiatric faculty member for the academic year 1989-1990.
- May 1989 Selected by the graduating class of the University of California, San Francisco, School of Medicine as the outstanding psychiatric faculty member for the academic year 1988-1989.
- May 1987 Selected by the faculty and students of the University of California, San Francisco, School of Medicine as the recipient of the Henry J. Kaiser Award For Excellence in Teaching.
- May 1987 Selected by the graduating class of the University of California, San Francisco, School of Medicine as Outstanding Psychiatric Resident. The award covered the period of 1 July 1985 to 30 June 1986, during which time I served as Chief Psychiatric resident, San Francisco General Hospital.
- May 1985 Selected by the graduating class of the University of California, San Francisco, School of Medicine as Outstanding Psychiatric Resident.
- 1985 Mead-Johnson American Psychiatric Association Fellowship. One of sixteen nation-wide psychiatric residents selected because of a demonstrated commitment to public sector psychiatry. Made presentation at Annual Hospital and Community Psychiatry Meeting in Montreal, Canada in October 1985, on the "Psychiatric Aspects of the Acquired Immunodeficiency Syndrome."

MEMBERSHIPS:

June 2000- Present	California Association of Drug Court Professionals.
July 1997- June 1998	President, Alumni-Faculty Association, University of California, San Francisco, School of Medicine.
July 1996 - June 1997	President-Elect, Alumni-Faculty Association, University of California, San Francisco, School of Medicine.
July 1995 - June 1996	Vice President, Northern California Area, Alumni-Faculty Association, University of California, San Francisco, School of Medicine.
April 1995 - April 2002	Associate Clinical Member, American Group Psychotherapy Association.
July 1992 - June 1995	Secretary-Treasurer, Alumni-Faculty Association, University of California, San Francisco, School of Medicine.
July 1990 - June 1992	Councilor-at-large, Alumni-Faculty Association, University of California, San Francisco, School of Medicine

PUBLIC SERVICE:

June 1992 -	Examiner, American Board of Psychiatry and Neurology, Inc.
November 1992 - January 1994	California Tuberculosis Elimination Task Force, Institutional Control Subcommittee.
September 2000- April 2005	Editorial Advisory Board, <i>Juvenile Correctional Mental Health Report</i> .
May 2001- Present	Psychiatric and Substance Abuse Consultant, San Francisco Police Officers' Association.
January 2002- June 2003	Psychiatric Consultant, San Francisco Sheriff's Department Peer Support Program.
February 2003- April 2004	Proposition "N" (Care Not Cash) Service Providers' Advisory Committee, Department of Human Services, City and County of San Francisco.
December 2003- January 2004	Member of San Francisco Mayor-Elect Gavin Newsom's Transition Team.
February 2004- June 2004	Mayor's Homeless Coalition, San Francisco, CA.
April 2004- January 2006	Member of Human Services Commission, City and County of San Francisco.

February 2006-
January 2007

Vice President, Human Services Commission, City and County of San Francisco.

February 2007-
Present

President, Human Services Commission, City and County of San Francisco.

UNIVERSITY SERVICE:

July 1999-
July 2001

Seminar Leader, National Youth Leadership Forum On Medicine.

October 1999-
October 2001

Lecturer, University of California, San Francisco, School of Medicine Post Baccalaureate Reapplicant Program.

November 1998-
November 2001

Lecturer, University of California, San Francisco, School of Nursing, Department of Family Health Care Nursing. Lecture to the Advanced Practice Nurse Practitioner Students on Alcohol, Tobacco and Other Drug Dependencies.

January 1994 -
January 2001

Preceptor/Lecturer, UCSF Homeless Clinic Project.

June 1990 -
November 1996

Curriculum Advisor, University of California, San Francisco, School of Medicine.

June 1987 -
June 1992

Facilitate weekly Support Groups for interns in the Department of Medicine. Also, provide crisis intervention and psychiatric referral for Department of Medicine housestaff.

January 1987 -
June 1988

Student Impairment Committee, University of California San Francisco, School of Medicine.
Advise the Dean of the School of Medicine on methods to identify, treat and prevent student impairment.

January 1986 -
June 1996

Recruitment/Retention Subcommittee of the Admissions Committee, University of California, San Francisco, School of Medicine.
Advise the Dean of the School of Medicine on methods to attract and retain minority students and faculty.

October 1986 -
September 1987

Member Steering Committee for the Hispanic Medical Education Resource Committee.
Plan and present educational programs to increase awareness of the special health needs of Hispanics in the United States.

September 1983 -
June 1989

Admissions Committee, University of California, School of Medicine. Duties included screening applications and interviewing candidates for medical school.

October 1978 -
December 1980

Co-Founder and Director of the University of California, San Francisco Running Clinic.
Provided free instruction to the public on proper methods of exercise and preventative health measures.

TEACHING RESPONSIBILITIES:

July 2003- Present	Facilitate weekly psychotherapy training group for residents in the Department of Psychiatry.
September 2001- June 2003	Supervisor, San Mateo County Psychiatric Residency Program.
January 2002- January 2004	Course Coordinator of Elective Course University of California, San Francisco, School of Medicine, "Prisoner Health." This is a 1-unit course, which covers the unique health needs of prisoners.
April 1999- April 2001	Lecturer, UCSF School of Pharmacy, Committee for Drug Awareness Community Outreach Project.
February 1998- June 2000	Lecturer, UCSF Student Enrichment Program.
January 1996 - November 1996	Supervisor, Psychiatry 110 students, Veterans Comprehensive Homeless Center.
March 1995- Present	Supervisor, UCSF School of Medicine, Department of Psychiatry, Substance Abuse Fellowship Program.
September 1994 - June 1999	Course Coordinator of Elective Course, University of California, San Francisco, School of Medicine. Designed, planned and taught course, Psychiatry 170.02, "Drug and Alcohol Abuse." This is a 1-unit course, which covers the major aspects of drug and alcohol abuse.
August 1994 - February 2006	Supervisor, Psychiatric Continuity Clinic, Haight Ashbury Free Clinic, Drug Detoxification and Aftercare Project. Supervise 4th Year medical students in the care of dual diagnostic patients.
February 1994 - February 2006	Consultant, Napa State Hospital Chemical Dependency Program Monthly Conference.
July 1992 - June 1994	Facilitate weekly psychiatric intern seminar, "Psychiatric Aspects of Medicine," University of California, San Francisco, School of Medicine.
July 1991- Present	Group and individual psychotherapy supervisor, Outpatient Clinic, Department of Psychiatry, University of California, San Francisco, School of Medicine.
January 1991	Lecturer, University of California, San Francisco, School of Pharmacy course, "Addictionology and Substance Abuse Prevention."
September 1990 - February 1995	Clinical supervisor, substance abuse fellows, and psychiatric residents, Substance Abuse Inpatient Unit, San Francisco Veterans Affairs Medical Center.

September 1990 - November 1996	Off ward supervisor, PGY II psychiatric residents, Psychiatric Inpatient Unit, San Francisco Veterans Affairs Medical Center.
September 1990 - June 1991	Group therapy supervisor, Psychiatric Inpatient Unit, (PIU), San Francisco Veterans Affairs Medical Center.
September 1990 - June 1994	Course coordinator, Psychiatry 110, San Francisco Veterans Affairs Medical Center.
September 1989 - November 1996	Seminar leader/lecturer, Psychiatry 100 A/B.
July 1988 - June 1992	Clinical supervisor, PGY III psychiatric residents, Haight Ashbury Free Clinic, Drug Detoxification and Aftercare Project.
September 1987 - Present	Tavistock Organizational Consultant. Extensive experience as a consultant in numerous Tavistock conferences.
September 1987 - December 1993	Course Coordinator of Elective Course, University of California, San Francisco, School of Medicine. Designed, planned and taught course, Psychiatry 170.02, "Alcoholism". This is a 1- unit course offered to medical students, which covers alcoholism with special emphasis on the health professional. This course is offered fall quarter each academic year.
July 1987- June 1994	Clinical supervisor/lecturer FCM 110, San Francisco General Hospital and Veterans Affairs Medical Center.
July 1986 - June 1996	Seminar leader/lecturer Psychiatry 131 A/B.
July 1986 - August 1990	Clinical supervisor, Psychology interns/fellows, San Francisco General Hospital.
July 1986 - August 1990	Clinical supervisor PGY I psychiatric residents, San Francisco General Hospital
July 1986 - August 1990	Coordinator of Medical Student Education, University of California, San Francisco General Hospital, Department of Psychiatry. Teach seminars and supervise clerkships to medical students including: Psychological Core of Medicine 100 A/B; Introduction to Clinical Psychiatry 131 A/B; Core Psychiatric Clerkship 110 and Advanced Clinical Clerkship in Psychiatry 141.01.
July 1985 - August 1990	Psychiatric Consultant to the General Medical Clinic, University of California, San Francisco General Hospital. Teach and supervise medical residents in interviewing and communication skills. Provide instruction to the clinic on the psychiatric aspects of ambulatory medical care.

COMMUNITY SERVICE:

February 2006- Present	Board of Directors, Physician Foundation at California Pacific Medical Center.
June 2004- Present	Psychiatric Consultant, Hawaii Drug Court.
November 2003- Present	Organizational/Psychiatric Consultant, State of Hawaii, Department of Human Services.
June 2003- December 2004	Monitor of the psychiatric sections of the "Ayers Agreement," New Mexico Corrections Department (NMCD). This is a settlement arrived at between plaintiffs and the NMCD regarding the provision of constitutionally mandated psychiatric services for inmates placed within the Department's "Supermax" unit.
October 2002- Present	Juvenile Mental Health and Medical Consultant, United States Department of Justice, Civil Rights Division, Special Litigation Section.
July 1998- June 2000	Psychiatric Consultant to the Pacific Research and Training Alliance's Alcohol and Drug Disability Technical Assistance Project. This Project provides assistance to programs and communities that will have long lasting impact and permanently improve the quality of alcohol and other drug services available to individuals with disabilities.
July 1998- February 2004	Psychiatric Consultant to the National Council on Crime and Delinquency (NCCD) in its monitoring of the State of Georgia's secure juvenile detention and treatment facilities. NCCD is acting as the monitor of the agreement between the United States and Georgia to improve the quality of the juvenile justice facilities, critical mental health, medical and educational services, and treatment programs. NCCD ceased to be the monitoring agency for this project in June 1999. At that time, the Institute of Crime, Justice and Corrections at the George Washington University became the monitoring agency. The work remained unchanged.
July 1998- July 2001	Psychiatric Consultant to the San Francisco Campaign Against Drug Abuse (SF CADA).
March 1997- Present	Technical Assistance Consultant, Center for Substance Abuse Treatment, Substance Abuse and Mental Health Services Administration, Department of Health and Human Services.
January 1996- June 2003	Psychiatric Consultant to the San Francisco Drug Court.
November 1993- June 2001	Executive Committee, Addiction Technology Transfer Center (ATTC), University of California, San Diego.

December 1992 - December 1994	Institutional Review Board, Haight Ashbury Free Clinics, Inc. Review all research protocols for the clinic per Department of Health and Human Services guidelines.
June 1991 - February 2006	Chief of Psychiatric Services, Haight Ashbury Free Clinic. Overall responsibility for psychiatric services at the clinic.
December 1990 - June 1991	Medical Director, Haight Ashbury Free Clinic, Drug Detoxification and Aftercare Project. Responsible for directing all medical and psychiatric care at the clinic.
October 1996 - July 1997	Psychiatric Expert for the U. S. Federal Court in the case of Madrid v. Gomez. Report directly to the Special Master regarding the implementation of constitutionally mandated psychiatric care to the inmates at Pelican Bay State Prison.
April 1990 - January 2000	Psychiatric Expert for the U.S. Federal Court in the case of Gates v. Deukmejian. Report directly to the court regarding implementation and monitoring of the consent decree in this case. (This case involves the provision of adequate psychiatric care to the inmates at the California Medical Facility, Vacaville).
January 1984 - December 1990	Chief of Psychiatric Services, Haight Ashbury Free Clinic, Drug Detoxification and Aftercare Project. Direct medical/psychiatric management of project clients; consultant to staff on substance abuse issues. Special emphasis on dual diagnostic patients.
July - December 1981	Medical/Psychiatric Consultant, Youth Services, Hospitality House, San Francisco, CA. Advised youth services staff on client management. Provided training on various topics related to adolescents. Facilitated weekly client support groups.

SERVICE TO ELEMENTARY AND SECONDARY EDUCATION:

January 1996 - Present	Baseball, Basketball and Volleyball Coach, Convent of the Sacred Heart Elementary School, San Francisco, CA.
September 1994 - Present	Soccer Coach, Convent of the Sacred Heart Elementary School, San Francisco, CA.
June 1991 - June 1994	Board of Directors, Pacific Primary School, San Francisco, CA.
April 1989 - July 1996	Umpire, Rincon Valley Little League, Santa Rosa, CA.
September 1988 - May 1995	Numerous presentations on Mental Health/Substance Abuse issues to the student body, Hidden Valley Elementary School and Santa Rosa Jr. High School, Santa Rosa, CA.

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UNITED STATES OF AMERICA

v.

KHALID SHEIKH MOHAMMED, WALID
MUHAMMAD SALIH MUBARAK BIN
‘ATTASH, RAMZI BIN AL SHIBH, ALI
ABDUL AZIZ ALI, MUSTAFA AHMED
ADAM AL HAWSAWI

Defense Motion
for Special Relief for an Enlargement of Time
to File and a Continuance

13 June 2008

1. **Timeliness:** This Motion is timely filed within the deadline prescribed by the Commission in the Schedule for Trial and Order, dated 9 June 2008 (“Trial Schedule”).
2. **Relief Sought:** On behalf of Mr. Ramzi bin al Shibh, the defense respectfully requests the Commission to grant enlargements of time as to deadlines to file pleadings and a continuance of the hearing scheduled to resolve the competency issue, as prescribed in the Trial Schedule.

The defense seeks specific relief for the Commission to modify the Trial Schedule as follows:

- a. 24 June 2008: Commission order the government to respond to the defense request for discovery, dated 10 June 2008;
- b. 30 July 2008¹: Deadline for the defense to file pleadings relating to whether Mr. bin al Shibh is legally competent to waive his right to counsel and/or stand trial;
- c. 13 August 2008: Hearing at U.S. Naval Base, Guantanamo Bay, Cuba (GTMO) for a determination of Mr. bin al Shibh’s competency; and
- d. Stay all further dates pending adjudication of the competency hearing. Once the Commission makes findings and issues an order regarding competency, the defense will be prepared to discuss proposed dates for a Trial Schedule.

¹ All specifically requested dates are tentative as they are dependent upon the government providing full and timely production of discovery relating to this issue. If the government fails to provide all discoverable materials, or fails to do so in a timely manner, the defense would be compelled to seek further relief.

3. **Overview:** Mr. bin al Shibh repeatedly stated during his arraignment on 5 June 2008 that he desired to waive his right to counsel and represent himself, *pro se*. The Commission did not enter any findings of facts or conclusions as to his request. The Commission stated that it was unable to reach findings about his competency regarding his counsel election based upon information provided to the Commission about psychotropic medication administered to Mr. bin al Shibh prior to and on the date of the hearing. The Commission, *sua sponte*, later put at issue whether Mr. bin al Shibh is competent to stand trial when it issued the Trial Schedule that set a deadline for motions from the defense on "R.M.C. 909 matters."

The defense seeks an enlargement of time to file pleadings and a continuance of the hearing as more time is required to analyze and brief the Commission as to whether Mr. bin al Shibh is competent to waive his right to counsel and/or competent to stand trial. This enlargement of time is required because: 1.) the government has not provided discovery to the defense that is germane to the issue; 2.) the U.S. Supreme Court will soon issue a decision in the case of *Indiana v. Edwards* that may significantly change the legal standard regarding competency to waive counsel; 3.) the defense counsels lack the necessary knowledge, skill, experience, training, and education to properly understand and analyze medical information and reach any conclusions therefrom; 4.) more time is required so that the parties can analyze what impact, if any, the recent U.S. Supreme Court opinion in *Boumediene v. Bush* will have on this case; and 5.) Mr. bin al Shibh will suffer grave prejudice to this rights if more time is not provided to properly adjudicate this issue.

4. **Burden and Standard of Proof:** As the moving party, the defense bears the burden of proof on any question of fact; this burden is met by a showing of a preponderance of evidence. See R.M.C. 905(c).

5. **Facts:**

a. CDR Lachelier was detailed as defense counsel on 7 April 2008; LT Federico was detailed as defense counsel on 10 April 2008. [AE 012]. On 9 May 2008, the charges were referred capital for trial by military commission. [AE 001]. On 14 May 2008, the Military Judge was detailed and provided initial notice to the parties that a hearing was scheduled for arraignment at GTMO on 5 June 2008. [AE 008]. Mr. Thomas Durkin entered an appearance as civilian defense counsel on 18 May 2008. [AE 022].

b. On 18 May 2008 and on behalf of Mr. bin al Shibh, the defense sought a modification of the Commission order of 14 May 2008 requesting additional time for civilian counsel to enter an appearance because the defense attorneys detailed lacked the requisite experience and qualifications under American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, which specify their applicability to the military commissions. [DE 007]. On 19 May 2008, the Commission modified its order in an email response, ruling that defense counsel could be added. [Filings Inventory, Page 2 of 7]

c. On 19 May 2008 and on behalf of Mr. bin al Shibh, the defense sought a continuance of the arraignment for a date to be determined. [AE 018]. The defense argued: that it required more time to allow Mr. bin al Shibh to meet with Mr. Durkin, whose security clearance was still pending adjudication, so as to ensure he could have make an informed election regarding his right to counsel; that the defense lacked adequate facilities, resources, and security clearances to perform its duties adequately; and that restrictions on travel and client availability greatly hindered the defense ability to prepare to represent Mr. bin al Shibh. The Motion was denied on 22 May 2008, as the Commission found that "the fact that all defense counsel are not yet fully integrated into the litigation process is not a valid basis in support of the continuance request" and that "progress is being made with regard to dealing with logistical challenges associated with this case." [Filings Inventory, Page 6 of 7]

d. During an 802 conference in GTMO with the Military Judge and counsel on 4 June 2008, the defense again stated its intent to seek a continuance and that the Commission not engage in a colloquy with Mr. bin al Shibh about his rights to counsel and not request that he make an election regarding counsel. The defense argued that it had not yet had enough time to ensure Mr. bin al Shibh was competent to make a voluntary and understanding election. The defense further stated its intent to challenge the jurisdiction of the Commission, relying upon *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974). In response, the Military Judge stated that he intended to "take a run at it" as it was the accused's right to exercise or not exercise. The Military Judge further stated that "if they won't play along, the detailed lawyer will be the guy."

e. Near the conclusion of this 802 conference on 4 June 2008, Mr. [REDACTED] Senior Security Advisor (SSA) to the Commissions, advised that JTF-GTMO provided notice of a potential safety concern with one of the five accused that would require the accused to be shackled at the feet. After the 802 conference, Lt Col [REDACTED] U.S. Army, Officer in Charge of Security personnel for the arraignment, informed counsel that the additional security precautions were required for Mr. bin al Shibh because he is being

administered psychotropic medication by JTF-GTMO. The defense requested a meeting with Mr. bin al Shibh's physician for the next morning and Lt Col [REDACTED] stated he would pass along the request to JTF-GTMO. The physician was never named, nor made available to the defense. Lt Col [REDACTED] also informed counsel that the Military Judge had been apprised of the fact that Mr. bin al Shibh was being administered [REDACTED] and that as a result, the Military Judge had authorized that Mr. bin al Shibh be shackled during the arraignment.

f. Mr. bin al Shibh was arraigned on 5 June 2008. Prior to any discussion between the Military Judge and Mr. bin al Shibh, the defense again requested that the Commission not engage in a colloquy regarding right to counsel. In support of this request, the defense again raised the issue that it had not been provided adequate time to prepare Mr. bin al Shibh to make an election regarding counsel and that he was under the influence of psychotropic medication. The Military Judge emphatically denied this request. Thereafter, the Military Judge engaged in a colloquy with Mr. bin al Shibh regarding his rights to counsel. During the course of this discussion, Mr. bin al Shibh stated that, not only did he want to represent himself but he also has been seeking martyrdom for five years and that if it happened today, he would welcome it. After further discussion, the Military Judge stated that he could not find that Mr. bin al Shibh was competent to make a voluntary and understanding waiver of his rights to counsel, focusing specifically on the fact that Mr. bin al Shibh may have been influenced by the consumption of psychotropic medication. The Military Judge stated he would take up this issue at a future date, to be determined. Thereafter, the defense sought an order from the Commission for a release of medical records in the possession of the JTF-GTMO so that it could expeditiously begin analyzing the issue of competency. The Military Judge refused to entertain this request and stated that the defense must make a formal written request.

g. On 9 June 2008, the Commission issued the Trial Schedule instructing that any motions "for unspecified relief with regard to Mr. Binalshibh [sic] involving R.M.C. 909 matters" are due on 13 June 2008. The Commission further ordered that a hearing will be held in GTMO on 10 July 2008 to resolve the issue regarding competency.

h. On 10 June 2008, the defense sent a discovery request² to the government for any and all records and documents in the possession of the United States government related to the physical and mental health of Mr. bin al Shibh. The request sought all information regarding physical and mental health from all times subsequent to Mr. bin al Shibh's arrest in Karachi, Pakistan on 11 September 2002, and further sought all such materials be provided no later than 1600 EST 11 June 2008. [Attachment A]. Later on 10 June 2008, the government responded that "the Prosecution will not be able to turn over any items it determines are discoverable by that time." [Attachment B].

i. On 10 June 2008, the defense made a request to the JTF GTMO to meet with Mr. bin al Shibh on the earliest possible date it was permitted to travel to GTMO, on 17 and 18 June 2008. [Attachment C]. In response, the defense was informed that it would only be permitted to meet with Mr. bin al Shibh on one occasion, the afternoon of arrival in

² The government previously provided some minimal discovery on 3 June 2008 on a CD. This defense request is narrowly tailored to seek information, documents, and materials relevant to the competency issue.

GTMO. [Attachment D].

j. On 10 June 2008, the defense submitted a [REDACTED]

[REDACTED] to the SSA. [Attachment E]. The Commission has ordered that the defense must presume that all words spoken by Mr. bin al Shibh are classified as [REDACTED] [AE 032-A, ¶ 24]. It is foreseeable that the defense will be required to divulge information obtained during client interviews in its pleadings pertaining to the issue of competency. As such, the defense wanted to ensure it had the proper guidance on how to properly accomplish such disclosure. In response, the defense learned that as of 12 June 2008, [REDACTED]

Later that day, the defense was notified that employees of the Pentagon Force Protection Agency determined there was a problem with the SCIF in its [REDACTED] office. The defense counsel have been ordered not to use the SCIF, the only one available for their exclusive use, until further notified because the SCIF's certification is now in question due to technical concerns. The final certification must be done by government agencies, other than the Office of the Chief Defense Counsel. The result is that, at present, the defense lacks any properly certified facility in the United States, designated for its exclusive use, wherein counsel can verbally discuss information classified as [REDACTED] which includes all information derived from interviews with Mr. bin al Shibh.

k. On 11 June 2008, the defense submitted a request for production of audio/video recordings and a transcript of the hearing held in GTMO on 5 June 2008. [Attachment G]. That request remains pending.³

l. During the arraignment on 5 June, several of the detainees made general allegations of being tortured while in the custody of the United States government. The defense has not been provided any documents or information from the government that pertains to Mr. bin al Shibh's conditions of confinement, specific interrogation techniques employed against him, and treatment during his time in custody. The defense is only privy to such information as it may be disclosed by Mr. bin al Shibh during client interviews, and such information would be classified as [REDACTED]. Such information requires specialized knowledge, skill, experience, training, and education to adequately analyze the information and reach any conclusions regarding competency. [Attachment H] At present, the defense does not employ any person with the necessary expertise that may allow it to properly brief the Commission on this issue. The defense will require the assistance of an expert, and may further require time to ensure that a properly qualified expert can obtain a security clearance to have access to the information and to perform an evaluation of Mr. bin al Shibh.

³ The defense was notified by the Clerk of Court on 12 June 2008 that there exists a draft transcript that must go through a classification review. Further, the transcript cannot be released without the permission of the Military Judge. As such, any and all citations and references to specific statements made during the hearing on 5 June 2008 are derived from memory of defense counsel and notes taken during the proceeding. Any discrepancies or inaccuracies may be easily cured if the defense request for a transcript is granted.

6. **Law and Argument:**

“The military judge in a military commission under this chapter may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just.” Military Commissions Act of 2006 (MCA), 10 U.S.C. §949e. Additionally, the military judge shall grant a continuance only upon the findings that the interests of justice served by the continuance outweigh the best interests of the both the public and the accused in a prompt trial of the accused. *See* R.M.C. 707(b)(4)(E)(i). A trial court’s ruling on whether to grant a continuance is reviewed for abuse of discretion. *See United States v. Wiest*, 59 M.J. 276, 279 (C.A.A.F. 2004), *citing United States v. Weisbeck*, 50 M.J. 461, 464-66 (C.A.A.F. 1999). In determining abuse of discretion, the following factors have been articulated as those that may be considered: surprise, nature of any evidence involved, timeliness of the request, substitute testimony or evidence, availability of witness or evidence requested, length of continuance, prejudice to the opponent, moving party received prior continuances, good faith of the moving party, use of reasonable diligence by the moving party, possible impact on verdict, and prior notice. *See Id.*, *citing United States v. Miller*, 47 M.J. 352, 358 (C.A.A.F. 1997). After a consideration of the factors germane to this case, the interest of justice demands that an enlargement of time and continuance be granted.

I. A CONTINUANCE IS REQUIRED BECAUSE THE GOVERNMENT HAS NOT PROVIDED ANY INFORMATION OR MATERIALS RELEVANT TO THE ISSUE OF COMPETENCY

At issue before the Commission is whether it may accept Mr. bin al Shibh’s waiver of his right to counsel by finding that he is competent to understand the disadvantages of self-representation and that his waiver is voluntary and understanding. *See* R.M.C. 506(c). In order to represent himself, the accused must knowingly and intelligently forgo those relinquished benefits. *See Faretta v. California*, 422 U.S. 806, 835 (1975). In *Faretta*, the Court noted that

record affirmatively showed that the defendant was "literate, competent, and understanding, and that he was voluntarily exercising his informed free will." *Id.*

In a typical criminal trial in the United States, the determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused. *See United States v. Singleton*, 107 F.3d 1091, 1097 (4th Cir. 1997), quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), *United States v. Gallop*, 838 F.2d 105 (4th Cir. 1988)(affirming court's exploration of the defendant's background, capabilities, and understanding of the dangers and disadvantages of proceeding *pro se*), *see also United States v. Simpson*, No. 05-6140-cr, 2007 U.S. App. LEXIS 8859 (2^d Cir. 2007)(unpublished), *United States v. Tracy*, 12 F.3d 1186, 1191 (2^d Cir. 1993).

This is not a typical criminal trial. Mr. bin al Shibh is not a typical criminal defendant. The Military Commission is not a well-established tribunal long in precedent and tradition. Thus the defense is faced with representing an individual from another culture who has an inherent distrust of, and animosity towards, all Americans, especially those who wear its military uniform. Mr. bin al Shibh is allegedly a member of an organization (al Qaeda) that, according to the Government, declared war on the United States and attacked its personnel and interests and "have repeatedly publicly proclaimed their intent to continue to do so." *See* PO 001, ¶ 6(a)(2); AE 024. In addition, Mr. bin al Shibh stated during his arraignment that he welcomes the opportunity to die so that he could achieve martyrdom.

Inexplicably, despite defense counsel being detailed to represent Mr. bin al Shibh in early April 2008, and already facing enormous obstacles to fully and competently represent him, the government has left the defense in the dark, without access to any documents, materials, or information about his background, experience, and conduct, particularly while in the custody of

the United States government. This information is an absolute prerequisite for the defense even to begin an analysis regarding whether Mr. bin al Shibh is competent to waive his right to counsel and the related and necessarily intertwined issue with respect to whether he is competent to stand trial.

It would undoubtedly invite reversal of any ensuing conviction to require the defense to file pleadings regarding competency when the government has not provided the defense with any information about the medical condition of Mr. bin al Shibh, not even the bare minimum information of the name, dosage, and reasons why Mr. bin al Shibh is being administered the psychotropic medication alluded to on the record during his arraignment. The government has this information, the defense does not. Nor can the defense obtain this information by independent investigation because it is, presumably, classified as [REDACTED]. The defense has no concept of the amount or breadth of the materials and information under the control of the United States government that may be relevant to this issue. Based upon the government's disclosure the night prior to the arraignment, however, as well as Mr. bin al Shibh's stated desire to die as a martyr, it is foreseeable that a full and thorough review of all government records pertaining to Mr. bin al Shibh and a mental health evaluation may be needed.

To further entangle matters, the present compromise of the certification of the defense SCIF in [REDACTED] precludes defense counsels from even speaking with each other about the substance of any conversations with Mr. bin al Shibh. The Office of the Chief Defense Counsel has persistently, yet patiently requested it be provided with adequate facilities and equipment. Such requests have been responded to with many promises, but few tangible results. The Commission has noted that "progress is being made with regard to dealing with logistical challenges associated with this case." See Commissions Order, 22 May 2008. Though

appreciated, progress that does not lead to function is not good enough. In order for the defense to perform its most fundamental duties representing a client facing the death penalty, the government must provide the defense the full ability to store, discuss, reproduce, and transmit the information. The interests of justice demand the Commission provide an enlargement of time and continuance to ensure the defense can prepare proper pleadings on this issue.

II. AN ENLARGEMENT OF TIME AND CONTINUANCE ARE REQUIRED SO THAT ALL PARTIES MAY DERIVE THE BENEFIT OF A DECISION PENDING FROM THE U.S. SUPREME COURT IN THE CASE OF *INDIANA V. EDWARDS*

On March 26, 2008, the U.S. Supreme Court heard oral argument in the case of *Indiana v. Edwards* on the following question: may States adopt a higher standard for measuring competency to represent oneself at trial than for measuring competency to stand trial?⁴ See *Indiana v. Edwards*, 866 N.E.2d 252 (Ind. 2007); *cert. granted*, 128 S.Ct. 741 (No. 07-208, 2007 Term). In *Edwards*, the State of Indiana argued to the Supreme Court that *Faretta* is textually and historically unsound and should be overruled. See Brief for Petitioner at 48, *Edwards* (No. 07-208). In addition, the American Psychiatric Association and American Academy of Psychiatry filed a brief, *amici curiae*, in support of neither party, stating that “The *Faretta* right is subject to being overridden to prevent mental illness from destroying the reliability of the adversarial process for testing criminal charges.” *Amici Curiae* Brief at 4, *Edwards* (No. 07-208). The question at issue in *Edwards* is directly on point to the question before the Commission with respect to Mr. bin al Shibh.

It is foreseeable that the pending decision in *Edwards* may provide authoritative guidance to the Commission about the applicable legal standard for determining whether Mr. bin al Shibh

⁴ In the context of requesting a continuance, the defense sought, in good faith, to provide notice to the Commission of this pending decision during the arraignment as the defense was aware the decision may have a direct impact on the legal validity of a colloquy concerning self-representation. The Military Judge denied the defense the opportunity even to mention this issue.

is competent to waive his right to counsel under R.M.C. 506(c). As stated, *supra*, whether Mr. bin al Shibh presently suffers from a severe mental disease or defect is not yet known to the defense. So, in addition to the fact that the government has yet to provide any materials or information relevant to this issue, the fact that the legal standard for competency required for self-representation may soon change also demands that an enlargement of time and continuance be granted.

III. THE DEFENSE HAS ACTED IN GOOD FAITH, AND THE LENGTH OF TIME SOUGHT IS REQUIRED BECAUSE THE DEFENSE LACKS THE EXPERTISE TO MAKE A MEDICAL DETERMINATION REGARDING COMPETENCY

The defense has acted in good faith, repeatedly seeking necessary time to adequately represent Mr. bin al Shibh. As detailed, *supra*, the defense sought a continuance of the arraignment so that it could have more time to build rapport with Mr. bin al Shibh, to adequately determine his goals and objectives of representation, and to assess whether he was competent to make a knowing and understanding election regarding counsel. This request was denied.

The Trial Schedule, setting deadlines and a hearing date, was ordered and provided to the defense on Monday, 9 June 2008. Within two days, the defense sought from the government the information, materials, facilities, and resources it needed to begin an analysis as to competency by submitting a request for discovery, request for production of recordings and transcript of the arraignment, and a request for guidance regarding classified information. Since answers to these requests remain pending, the present continuance request is timely and required.

If the government provides the information, materials, facilities, and resources to the defense, then it is anticipated the defense will further require the assistance of an expert with the knowledge, skill, experience, training, and education to properly understand and analyze medical information and reach any conclusions therefrom. The defense intends to seek an expert to

provide opinions and conclusions, so that it may adequately present the evidence to the Commission.

This entire Commission process is permeated with allegations of torture and subjection to cruel, inhumane, and degrading treatment by persons working for the United States government. It is troubling that such allegations have become so commonplace, they are now routine in every case. In fact, Congress was compelled to specifically address the admissibility of statements obtained by torture, creating a statutory distinction, in the Detainee Treatment Act of 2005, between the admissibility rules governing statements made before and after passage of that Act.¶ See M.C.A. §948r, *see also* R.M.C. 304.

Without question, the defense would be engaging in ineffective assistance of counsel if the defense does not fully explore the evidence and details about how Mr. bin al Shibh has been treated by the United States government since he has been in its custody, including the interrogation techniques utilized against him and conditions of confinement. *See Strickland v. Washington*, 466 U.S. 668 (1984). This inquiry is crucial to the question of competency because subjection to torture or cruel, inhumane, and degrading treatment “can cause severe and lasting physical and psychological harm.” *Affidavit* of Dr. Iacopino, pg. 2, ¶ 7 [**Attachment H**]. “Legal experts, including attorneys for the prosecution and the defense and adjudicators are not qualified to assess medical evidence of torture and ill treatment.” *Id.* at pg. 7, ¶ 17.

The specific relief the defense seeks is reasonable. The defense has no control over when it will be provided the information, materials, facilities, and resources it needs to begin an analysis as to competency. However, again acting in good faith, the defense proposes new deadlines be set that may potentially allow it sufficient time to conduct this analysis. “Effective medical evaluations of torture often require considerable time to conduct.” *Id.* at pg. 7, ¶ 18. The interest of justice requires that the Commission provide the defense an enlargement of time

and a continuance so that it may employ an expert to conduct the necessary physical and psychological examinations, obtain diagnostic testing and/or consultations, and, if needed, neuropsychiatric evaluations. *See Id.*

IV. THE U.S. SUPREME COURT DECISION IN *BOUMEDIENE V. BUSH* DEMANDS AN ENLARGEMENT OF TIME AND CONTINUANCE SO THAT ALL PARTIES MAY ANALYZE THE IMPACT

Yesterday, the United States Supreme Court issued its long-awaited opinion in the case of *Boumediene v. Bush*. 553 U.S. __ (2008). The Court held that aliens designated as enemy combatants and detained at GTMO have a constitutional privilege of habeas corpus, and that §7 of the Military Commissions Act of 2006 operates as an unconstitutional suspension of the writ. It will require more time to assess the full impact of this opinion on the Commission, including whether the Commission itself is unconstitutional and what impact Mr. bin al Shibh's pending habeas corpus petition may have on whether these proceedings should be permitted to go forward.⁵ In order to avoid the waste of resources and prejudice to both parties of litigating an issue that may later become moot, the interest of justice requires an enlargement of time and a continuance.

V. THE GOVERNMENT SUFFERS NO PREJUDICE FROM AN ENLARGEMENT OF TIME AND CONTINUANCE WHEREAS MR. BIN AL SHIBH WOULD SUFFER GRAVE PREJUDICE IF THE REQUEST IS DENIED

Mr. bin al Shibh is facing the death penalty. He has been in the custody of the United States government since September 2002. He was in the custody of the Central Intelligence Agency for four years, until being transferred to GTMO in September 2006, where he currently resides under the control of the Department of Defense. The United States government has had time to prepare its case against Mr. bin al Shibh. His defense attorneys have not. "It is vain to

⁵ Mr. bin al Shibh has pending both a habeas corpus petition, *Ramzi bin al Shibh v. Bush*, Case No. 06-1725 (October 5, 2006) and a Petition for Release and Other Relief Under Detainee Treatment Act of 2005, *Ramzi bin al Shibh v. Gates* (October 2, 2007).

give the accused a day in court, with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case."

Powell v. State of Ala., 287 U.S. 45, 59 (1932).

Any argument that Mr. bin al Shihb deserves an immediate day in court ignores the practical realities of his prolonged detention in GTMO. The following statements by the Brig. General Thomas Hartmann, U.S. Air Force, Legal Advisor to the Convening Authority, illustrate the realities of this detention:

There are two systems at Guantanamo Bay. One is the detention system. There are about 270 people here at Guantanamo who are being detained because they are enemy combatants who pose a danger to our soldiers, sailors, airman and Marines on the battlefield. It's not exactly like a POW status, but it's that concept, that you just remove those people from the battlefield to prevent them from harming our soldiers.

The second sub-setup of that is these commission trials that - my expectation is - what I've been advised is that they will try about 80 of these accused, and within that sub-set - so that's 80 of the 270. If there's an acquittal in any of the cases, the accused remains a detainee under the system down here. So to the extent that others determine that he remains a danger to our soldiers on the battlefield, he could still be detained. But that's separate from the commission process.

Transcript, pg. 7, *Talk of the Nation*, National Public Radio, June 2, 2008.

[Attachment I]. The claimed need for an expeditious resolution to this issue, when the defense does not have any information and lacks the necessary resources, is feigned and illusory.


7. **Request for Oral Argument:** The defense does not request oral argument, unless there is a dispute as to any material fact necessary for resolution of the issue. If such a dispute were to arise, the defense reserves the right to request production of witnesses and to request oral argument.

8. **Conference with Opposing Counsel:** On 12 June 2008, the defense conferred with the Prosecution regarding its requested relief. The prosecution opposes this motion.

9. Attachments:

- A. Defense Request for Production of Records Pertaining to Ramzi bin al Shibh, dated 10 June 2008 (5 pgs.)
- B. Email from Mr. Clayton Trivett, dated 10 June 2008 (1 pg.)
- C. Visitation Request to JTF GTMO, dated 9 June 2008 (1 pg.)
- D. Emails of [REDACTED] JTF GTMO (3 pgs.)
- E. Defense Request for Guidance on Reproduction and Transmittal of Information Classified as [REDACTED] During Litigation, dated 10 June 2008 (4 pgs)
- F. Email of [REDACTED] dated 11 June 2008 (4 pgs.)
- G. Defense Request for Production of Transcript, dated 11 June 2008 (1 pg.)
- H. Affidavit of [REDACTED], *Senior Medical Advisor, Physicians for Human Rights, Adjunct Professor of Medicine, University of Minnesota School of Medicine, Senior Research Fellow, Human Rights Center, University of California, Berkeley* (15 pgs.)
- I. Transcript, *Talk of the Nation*, National Public Radio, June 2, 2008, relevant excerpts (8 pgs.)

Respectfully submitted,

By: 
CDR SUZANNE LACHELIER, JAGC, USNR
LT RICHARD E.N. FEDERICO, JAGC, USN
Detailed Defense Counsels for
Ramzi bin al Shibh
Office of the Chief Defense Counsel
Office of Military Commissions
[REDACTED]

ATTACHMENT A

10 Jun 08

From: S.M. Lachelier, CDR, JAGC, USN, Detailed Defense Counsel
R.E.N. Federico, LT, JAGC, USN, Detailed Defense Counsel
To: Trial Counsel, Office of the Chief Prosecutor, Office of Military Commissions
Subj: REQUEST FOR DISCOVERY OF RECORDS PERTAINING TO
RAMZI BIN AL SHIBH

Ref: (a) Schedule for Trial and Order, dtd 09 Jun 08
(b) Rule for Military Commission 701
(c) Rule for Military Commission 909
(d) Rule for Military Commission 916(k)
(e) *Rompilla v. Beard*, 545 U.S. 374 (2005)
(f) *Wiggins v. Smith*, 539 U.S. 510 (2003)
(g) *Atkins v. Virginia*, 536 U.S. 304 (2002)
(h) *Faretta v. California*, 422 U.S. 806 (1975)
(i) *Pate v. Robinson*, 383 U.S. 375 (1966)
(j) *Indiana v. Edwards*, 866 N.E.2d 252 (2007), cert. granted Dec. 7, 2007, 128 S.Ct. 741 (NO. 07-208, 2007 Term)

Pursuant to references (a) through (j), defense counsel for Mr. Ramzi bin al Shibh respectfully request production of the following information no later than 1600 EST 11 June 2008:

1. All evidence in control of or known to the government concerning the physical and mental health of the accused. *See generally, United States v. Green*, 37 MJ. 88 (C.M.A. 1993). Material sought includes, but is not limited to, medical records reflecting psychiatric diagnosis or treatment or head injury of any type and drug and/or alcohol addiction diagnosis or rehabilitation records. *United States v. Brakefield*, 43 C.M.R. 828 (A.C.M.R 1971); *United States v. Brickey*, 8 M.J. 757 (A.C.M.R 1980) affirmed 16 M.J. 258 (C.M.A. 1983); *United States v. Eschalomi*, 23 M.J. 12 (C.M.A 1985); R.M.C. 701(c)(2), 706.
2. Any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, that are within the possession, custody, or control of the government at any level, the existence of which is known, or by the exercise of due diligence may become known, to the trial counsel, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case in chief at trial. R.M.C. 701(c)(2). This specifically includes, but is not limited to:
 - a. Copies of the records of any and all medical screenings, physicals, examinations, mental health evaluations, as well as notes prepared by any treating physician, physician's assistant, medic, psychiatrist, psychologist, chaplain, counselor, or other person who has examined the mental or physical condition of the accused at any time since he entered the custody of the United States (whether or not that custody was transferred at some time), including, but not limited to, all files on the accused created or kept by any "Behavioral Sciences Team" involved with the accused.

Subj: REQUEST FOR DISCOVERY OF RECORDS PERTAINING TO
RAMZI BIN AL SHIBH

- i. The defense does not authorize the government to review or examine any such reports, notes, or other documents as they may be covered by M.C.R.E. 503 or 513, by M.C.R.E. 302, or by common-law privileges and privacy interests with respect to medical treatment. The defense does, however, request that the government order any such material turned over to the defense and provide contact information for any person who obtained or created such reports or other material.
3. Any and all records containing information pertaining to Mr. Ramzi bin al Shibh's physical or mental condition. This request includes, but is not limited to, medical records held at Guantanamo Naval Base, as well as records in the possession of any (United States or other) government agency that had contact with Mr. Bin al Shibh since his detention or arrest on September 11, 2002.
4. The government has conceded that it is prescribing psychotropic medications to Mr. bin al Shibh. The defense requests production of the identity of the medications currently and previously prescribed to Mr. bin al Shibh, the dosage of all medications given to him, when the medications were each first prescribed and for how long. In addition, the defense requests production of the name and contact information of any and all physicians who have monitored, or are currently monitoring, Mr. bin al Shibh's condition. This request is not limited to any psychiatrists or psychologists, but includes a request for the name and contact information of all medical personnel who have monitored Mr. bin al Shibh.
5. The name of every person who interrogated, questioned or met with the accused after he was represented by counsel, the date of any such interrogation, questioning or meeting, the results of such meeting, as well as all notes or reports generated therefrom. R.M.C. 701 (c), (e); M.C.R.E. 304.
6. All records relating to alleged, suspected, investigated, substantiated or actual incidents of ill-treatment of prisoners held in or interrogated at Guantanamo Bay Naval Base and any other detention facility where the accused was held or interrogated since his capture, including but not limited to (R.M.C. 701 (c), (e); M.C.R.E. 304):
 - a. Records relating to the treatment of the accused while in custody, including any and all medical treatment he has received to-date.
 - b. Records relating to any person who was ever accused of, investigated for, or charged with ill-treatment of a detainee at Guantanamo Bay Naval Base, and any other facility where the accused was held or interrogated.
 - c. Records relating to any prisoner at Guantanamo Bay Naval Base, and any other facility where the accused was held or interrogated, who made an allegation of ill-treatment or who was otherwise involved in an investigation of ill-treatment at any time, including but not limited to Mr. Jawad, Mr. Al Qhatani, Mr. Manadel al-Jamadi other specific individuals known from media reports or other sources to have been abused at any facility where Mr. bin al Shibh was held or interrogated.

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7. All records relating to interrogation methods permitted or used at Guantanamo Bay Naval Base, including but not limited to (R.M.C. 701 (c), (e); M.C.R.E. 304):
 - a. Records, logs, notes relating to interrogation methods applied on the accused;
 - b. Records, logs, notes relating to interrogation methods applied on Khalid Sheikh Mohammed, Abu Zubayda and Abd al-Rahim al-Nashiri;
 - c. Policies, practices, guidelines, Standard Operating Procedures, Rules of Engagement or other guidance relating to interrogation methods permitted or used at Guantanamo Bay Naval Base and at any other facility where the accused has been held or interrogated.
 - d. Copies of any and all video-taped forcible removal of the accused from any location.
8. The name and contact information, as well as personnel records of, any person involved in the detention and/or interrogation of the accused at Guantanamo Bay Naval Base, or at any other facility where the accused was held or interrogated. R.M.C. 701 (c), (e); R.M.C. 703; M.C.R.E. 304.
9. All documents or information regarding any mistreatment of the accused at the hands of U.S. or Allied Armed Forces, civilians or contractors of which the government is aware. For purposes of this discovery request, 'mistreatment' includes the use of any "special interrogation plan," "harsh interrogation techniques" or other methods of interrogation. This includes any recorded allegation of such mistreatment made by the accused, any witness to the mistreatment, or any non-governmental organization (e.g., the International Committee for the Red Cross) that purports to document allegations of mistreatment. M.C.R.E. 304, R.M.C. 701(e)
10. All interrogation manuals, directives, instructions and other policy guidance issued by any agency involved in any aspect of the detention and interrogation of the accused or of any other witness in the case, including individuals whose statements the government provides to the defense through discovery. R.M.C. 701(b), (c), (e); M.C.R.E. 304.
11. All evidence affecting the credibility of government witnesses, or that of individuals who examined or treated or interrogated Mr. bin al Shibh, including but not limited to:
 - a. Prior civilian and court-martial conviction and all arrests or apprehension of any such persons. In complying with this discovery request, the defense requests the government check with the National Crime Information Center (NCIC), National Records Center (NRC), and all local military criminal investigatory organizations for each witness. *United States v. Jenkins*, 18 M.J. 583, 584-585 (A.C.M.R 1984); R.M.C. 701(c); M.C.R.E. 608, 609

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- b. Records of nonjudicial punishment, or adverse administrative actions (pending and completed), whether filed in official files or local unit files including, but not limited to, discharge prior to expiration of term of service for any reason, relief for cause actions, letters or reprimand or admonition and negative counseling relating to adverse or disciplinary actions concerning any such persons. R.M.C. 701(c); M.C.R.E. 608
 - c. All investigations of any type or description, pending initiation, ongoing or recently completed, that pertain to alleged misconduct of any type or description committed by any such persons. *United States v. Stone*, 40 MJ. 420 (C.M.A. 1994); R.M.C. 701(c); M.C.R.E. 608
 - d. All evidence in control of or known to the government concerning the mental status of any such persons. *United States v. Green*, 37 MJ. 88 (C.M.A. 1993). Material sought includes, but is not limited to, medical records reflecting psychiatric diagnosis or treatment or head injury of any type and drug and/or alcohol addiction diagnosis or rehabilitation records. *United States v. Brakefield*, 43 C.M.R. 828 (A.C.M.R 1971); *United States v. Brickey*, 8 M.J. 757 (A.C.M.R 1980) affirmed 16 M.J. 258 (C.M.A. 1983); *United States v. Eschalomi*, 23 M.J. 12 (C.M.A 1985); R.M.C. 701(c)(2), 706
 - e. A copy of the Official Military Personnel File (OMPF) of any such persons R.M.C.701(c)(1).
 - f. Copies of the official civilian personnel file of any such persons. R.M.C.701(c), (e)
 - g. The results of any polygraph examinations, conducted on any such persons, including the Polygraph Examiner Report and related polygraph records, the Polygraph Consent Form, the Polygraph Examination Authorization Request, the Polygraph Examination Quality Control Review and any rights certificate executed by the examiner and the subject. *United States v. Mouganel*, 6 M.J. 589 (A.F.C.M.R 1978); *United States v. Simmons*, 38 M.J. 376 (C.M.A.1993); R.M.C. 701(c).
 - h. The contents of all CITF accreditation files for all CITF investigators who have participated in investigations relating to this case, and similar such files for agents of any other government agency who have participated in investigations relating to this case. R.M.C.701(c), (e).
12. The court has ordered the defense to file a motion regarding any matters relating to Mr. bin al Shibh's health by 13 June 2008, per reference (a). Accordingly, the defense respectfully seeks production of the above information no later than 1600 EST June 11 2008.

By: 

S.M. Lachelier

CDR, JAGC, USN

Detailed Defense Counsel

Subj: REQUEST FOR DISCOVERY OF RECORDS PERTAINING TO
RAMZI BIN AL SHIBH

R.E.N. Federico
LT, JAGC, USN
Detailed Defense Counsel

T. A. Durkin, Esq.
Civilian Defense Counsel

ATTACHMENT B

Federico, Richard, LT, DoD OGC

From: Claytogg [REDACTED]
Sent: Tuesday, June 10, 2008 6:01 PM
To: Federico, Richard, LT, DoD OGC; Lachelier, Suzanne, CDR, DoD OGC; 'Thomas A. Durkin'
Cc: [REDACTED] Groharing, Jeff, Maj, DoD OGC; [REDACTED] Trivett,
Clayton, Mr, DoD OGC; [REDACTED]
[REDACTED] Morris, Lawrence, COL, DoD OGC
Subject: RE: Discovery Request ICO U.S. v. Mohammed, et al

LT Federico/CDR Lachelier/Mr. Durkin,

As of this morning, 10 June 2008, at 11:55 A.M. the Prosecution was in receipt of your discovery request on behalf of Mr. Ramzi bin al Shibh regarding the issue of his Pro Se representation. This request includes a request for the production of many items to be delivered no later than 1600 EST 11 June 2008. While the Prosecution is considering your request, as a professional courtesy I wanted to inform you all that the Prosecution will not be able to turn over any items it determines are discoverable by that time. Please call me if you have any questions or concerns.

v/r
Clay Trivett
Prosecutor
Office of Military Commissions
[REDACTED]

-----Original Message-----

From: Federico, Richard, LT, DoD OGC [mailto:federir@dodgc.osd.mil]
Sent: Tuesday, June 10, 2008 11:54 AM
To: [REDACTED] Groharing, Jeff, Maj, DoD OGC; [REDACTED] Trivett,
Clayton, Mr, DoD OGC; [REDACTED]
[REDACTED]
Cc: Lachelier, Suzanne, CDR, DoD OGC; Thomas A. Durkin
Subject: Discovery Request ICO U.S. v. Mohammed, et al

TCs:

Attached please find a defense request for discovery submitted on behalf of Ramzi Bin al Shibh.

Very Respectfully,

Richard E.N. Federico
Lieutenant, JAG Corps, U.S. Navy
Defense Attorney

Office of Military Commissions
Office of Chief Defense Counsel
[REDACTED]

CAUTION: This communication may be privileged as attorney work product and/or attorney-client communications or may be protected by another privilege recognized under the law. Do not distribute, forward, or release without the prior approval of the sender or DoD OGC Office of Military Commissions, Office of Chief Defense Counsel. In addition, this communication may contain individually identifiable information the disclosure of which, to any person or agency not entitled to receive it, is or may be prohibited by the Privacy Act, 5 U.S.C. 522a. Improper disclosure of protected information could result in civil action or criminal prosecution.

ATTACHMENT C

ATTACHMENT D

Federico, Richard, LT, DoD OGC

From: [REDACTED]
Sent: Wednesday, June 11, 2008 12:02 PM
To: Lachelier, Suzanne, CDR, DoD OGC; [REDACTED], DoD OGC
Cc: Federico, Richard, LT, DoD OGC; [REDACTED]
Subject: RE: Request for client visitation for 10013

Yes Ma'am.

-----Original Message-----

From: Lachelier, Suzanne, CDR, DoD OGC [REDACTED]
Sent: Wednesday, June 11, 2008 9:17 AM
To: [REDACTED]
Cc: Federico, Richard, LT, DoD OGC; [REDACTED]
Subject: RE: Request for client visitation for 10013

May I be placed on stand-by for any appointment to see Mr. bin al Shibh on Wed AM or PM, and Thurs AM?
Thank you for your consideration.
R/

S.M. Lachelier
CDR, JAGC, USN
Office of the Chief Defense Counsel
Office of Military Commissions
[REDACTED]

-----Original Message-----

From: [REDACTED]
Sent: Tuesday, June 10, 2008 2:58 PM
To: Lachelier, Suzanne, CDR, DoD OGC; Guzman, Christopher, LN1, DoD OGC
Cc: Federico, Richard, LT, DoD OGC; [REDACTED]
Subject: RE: Request for client visitation for 10013

No Ma'am. We are full on 18 and 19 June. Friday morning and afternoon are open though.

[REDACTED]
Assistant Staff Judge Advocate
JTF-GTMO
[REDACTED]

-----Original Message-----

From: Lachelier, Suzanne, CDR, DoD OGC [REDACTED]
Sent: Tuesday, June 10, 2008 2:56 PM
To: [REDACTED]
Cc: Federico, Richard, LT, DoD OGC; [REDACTED]
Subject: RE: Request for client visitation for 10013

Thanks Major. Anything early Thursday AM, the 19th?
R/

S.M. Lachelier
CDR, JAGC, USN
Office of the Chief Defense Counsel
Office of Military Commissions
[REDACTED]

-----Original Message-----

From: [REDACTED]
[mailto:[REDACTED]]
Sent: Tuesday, June 10, 2008 2:35 PM
To: Lachelier, Suzanne, CDR, DoD OGC; [REDACTED] OGC
Cc: Federico, Richard, LT, DoD OGC; [REDACTED]
Subject: RE: Request for client visitation for 10013

Ma'am,

We already have visits scheduled then too.

v/r
[REDACTED]
[REDACTED]
[REDACTED]

-----Original Message-----

From: Lachelier, Suzanne, CDR, DoD OGC [REDACTED]
Sent: Tuesday, June 10, 2008 1:03 PM
To: [REDACTED]
Cc: Federico, Richard, LT, DoD OGC; [REDACTED]
Subject: RE: Request for client visitation for 10013

Maj [REDACTED],
Could we have the afternoon of the 18th then?
Thanks for letting us know.
R/ CDR L

S.M. Lachelier
CDR, JAGC, USN
Office of the Chief Defense Counsel
[REDACTED]

-----Original Message-----

From: [REDACTED]
[mailto:[REDACTED]]
Sent: Tuesday, June 10, 2008 10:21 AM
To: [REDACTED] DoD OGC
Cc: Lachelier, Suzanne, CDR, DoD OGC; Federico, Richard, LT, DoD OGC; [REDACTED]
[REDACTED]
Subject: RE: Request for client visitation for 10013

LN [REDACTED]
The afternoon of 17 JUN is available, however the morning of 18 JUN is not.

CAPT [REDACTED] has done some indoc briefings for OMC at the request of [REDACTED]
I have copied him on this email. If he gives us the go ahead, we can do the indoc
briefing here.

v/r
[REDACTED]

[REDACTED]
Assistant Staff Judge Advocate
JTF-GTMO
[REDACTED]

-----Original Message-----

From: [REDACTED] DoD OGC [REDACTED]
Sent: Tuesday, June 10, 2008 9:38 AM
To: [REDACTED]
Cc: Lachelier, Suzanne, CDR, DoD OGC; Federico, Richard, LT, DoD OGC
Subject: Request for client visitation for 10013
Importance: High

MAJ [REDACTED],

Team Bin Al Shibh is requesting client visitation for 10013 and we are going to use a new translator. He has a TS/SCI but needs to be read-on;

would it be possible to get him read-on to the special program there? I spoke to Mr. [REDACTED] and he informed me that the SJA Office controls the

read-on. Please let me know if this is possible ASAP if it is not possible then we make arraignments for him to come up here to be read-on.

17 Jun 08 / afternoon
18 June 08 / morning

V/R
[REDACTED]

ATTACHMENT E

UNCLASSIFIED

Office of the Chief Defense Counsel
Office of the Military Commissions
1600 Defense Pentagon, Rm. 3B688
Washington DC 20301
Phone: (703) 588-0407
Fax: (703) 588-2036/2047

10 Jun 08

From: CDR Suzanne M. Lachelier, JAGC, USN, Detailed
Defense Counsel for Ramzi bin al Shibh
LT Richard E.N. Federico, Detailed Defense Counsel
for Ramzi bin al Shibh
To: Mr. [REDACTED], Senior Security Advisor
SUBJ: REQUEST FOR GUIDANCE ON REPRODUCTION AND TRANSMITTAL
OF INFORMATION CLASSIFIED AS TOP SECRET//SCI DURING
LITIGATION ICO UNITED STATES V. MOHAMMED, ET AL
Ref: (a) *United States v. Mohammed et. al.*, Protective
Order #3, dated 4 June 2008
(b) Email of LCDR Brian Mizer, JAGC, USN, Detailed
Defense Counsel for Ali Abdul Aziz Ali, dated 23
May 2008
(c) Exec. Order No. 13292, 60 Fed. Reg. 60 (2003)
(d) Memorandum, "Classification Guidance Pertaining
to Matters Which Might Be Raised in the case of
United States v. Mohammed, et. al."
(SECRET//NOFORN)
(e) M.C.R.E. 505(g)
(f) *United States v. Mohammed, et. al.*, Schedule for
Trial and Order, dated 9 June 2008

1. It is foreseeable that as the Commission seeks resolution to the question as to whether Mr. bin al Shibh is competent to make a knowing and intelligent waiver of his right to counsel, the defense may need to disclose information previously deemed to be classified as TOP SECRET//SCI. The defense believes it will be handling such classified information based upon oral guidance provided during the "read-on" required for eligibility to meet with Mr. bin al Shibh and the Order of the Military Judge, paragraph 24 of reference (a). The read-on and reference (a) instruct defense counsel to treat all communications obtained from Mr. bin al Shibh, however transmitted or recorded, as presumptively classified TOP SECRET//SCI.

UNCLASSIFIED

UNCLASSIFIED

SUBJ: REQUEST FOR GUIDANCE ON REPRODUCTION AND TRANSMITTAL
OF INFORMATION CLASSIFIED AS TOP SECRET//SCI DURING
LITIGATION ICO UNITED STATES V. MOHAMMED, ET AL

2. Pursuant to paragraph 10 of reference (a), the defense seeks guidance¹ as to proper procedures for transmittal of information classified as TOP SECRET//SCI. The basis for this request is to reconcile and clarify the proper procedures for the reproduction and transmittal of classified information acquired orally and/or through receipt of documents.

3. "No member of the Defense shall copy or reproduce any classified information, in any form, except in accordance with Department of Defense (DoD) regulations governing the reproduction of Classified Information." See para. 21, reference (a). The defense, however, does not believe that DoD Regulations are authoritative to provide guidance on the reproduction and transmittal of this information because, to the best of our knowledge and belief, the information potentially sought to be disclosed was classified by an Original Classification Authority outside of the DoD (most likely the Central Intelligence Agency (CIA)), through the establishment of a Special Access Program, per references (c) and (d).

4. In addition and based upon the guidance² provided to the defense thus far, it is our understanding that the defense is not permitted to reproduce information acquired orally, and classified as TOP SECRET//SCI, into electronic storage media. This is especially problematic while working at GTMO as there is no means, to the best of our knowledge and belief, to record, reproduce, or transmit information acquired orally from our client onto electronic storage media.

¹ This is the second such inquiry from the defense as reference (b) was submitted to the Prosecution and Attorney Advisors to the Commission, prior to the issuance of Protective Order #3, in conjunction with D001, Defense Joint Motion to Dismiss for Unlawful Influence. There was no response to this query from the defense.

² Such guidance includes but is not limited to: (1) the "read-on" for the Special Access program required before gaining access to Mr. bin al Shibh; (2) the briefing you provided to the defense at Building AV-34, U.S. Naval Base, Guantanamo Bay, Cuba (GTMO), on 3 June 2008; and (3) oral statements made by [REDACTED] SSO ELC GTMO.

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SUBJ: REQUEST FOR GUIDANCE ON REPRODUCTION AND TRANSMITTAL
OF INFORMATION CLASSIFIED AS TOP SECRET//SCI DURING
LITIGATION ICO UNITED STATES V. MOHAMMED, ET AL

5. The defense respectfully requests responses to the following questions:

a. May the defense reproduce information classified as TOP SECRET//SCI acquired orally and/or through receipt of documents, into electronic storage media, namely onto a word processing software, to create a document that may be printed and filed, UNDER SEAL, pursuant to paragraph 17 of reference (a)?

1. If there is an affirmative response to question 5.a, what computer system/network/printer may be utilized for the reproduction of this information?

2. Is there a different system to be used at our office in Rosslyn, Virginia than to be used while at GTMO?

b. If there is a negative response to question 5.a, what is an alternative method the defense may use to reproduce this information in a motion and/or other pleading?

c. Once reproduced, by what means can the defense transmit this information to you or an ASSA for filing?

d. Based upon the foregoing, what is the recommended procedure to provide proper written notice of intent to disclose classified information, pursuant to paragraph 15 of reference (a), with enough specificity to satisfy the requirements of reference (e)?

6. The defense respectfully requests written responses to the questions contained in paragraph 4. The defense further requests that your responses be provided no later than 1600 EST, Wednesday, 11 June 2008, or as soon as possible thereafter as, pursuant to reference (f), the Military Judge has established a deadline of 13 June 2008 for the defense to file pleadings that may require disclosure of classified information. Please feel free to contact LT Federico, should you have any questions or desire to discuss this matter further. He can be reached at [REDACTED] or [REDACTED]. Please copy

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SUBJ: REQUEST FOR GUIDANCE ON REPRODUCTION AND TRANSMITTAL
OF INFORMATION CLASSIFIED AS TOP SECRET//SCI DURING
LITIGATION ICO *UNITED STATES V. MOHAMMED, ET AL*

CDR Lachelier, [REDACTED] on any written
correspondence.

Very Respectfully,



Richard E.N. Federico
LT, JAGC, USN

Copy to:
MJ
Attorney Advisors
TCs

UNCLASSIFIED

ATTACHMENT F

Federico, Richard, LT, DoD OGC

From: [REDACTED]
Sent: Wednesday, June 11, 2008 11:46 AM
To: Lachelier, Suzanne, CDR, DoD OGC
Cc: [REDACTED]; Federico, Richard, LT, DoD OGC; [REDACTED]
DoD OGC; [REDACTED]; Groharing, Jeff, Maj, DoD OGC; Trivett, Clayton, Mr, DoD OGC; [REDACTED]; [REDACTED]; [REDACTED]
[REDACTED]
[REDACTED] Sgt, DoD OGC; [REDACTED]; David, Steven, COL, DoD OGC; Berrigan, Michael, Mr, DoD OGC; Morris, Lawrence, COL, DoD OGC; Pagel, Bruce, COL, DoD OGC; [REDACTED]
[REDACTED]
OGC; Thomas A. Durkin; Lachelier, Suzanne, CDR, DoD OGC; [REDACTED]
[REDACTED] LN1, DoD OGC; [REDACTED]
[REDACTED]; [REDACTED]
Subject: FW: Request for Guidance re: Classified Info ICO U.S. v. Mohammed, et al
Attachments: Request.Guidance.SSA.Binalshibh.10Jun08.pdf



Request.Guidance.
SSA.Binalshibh...

Commander Lachelier,

With regard to question 5.a - The defense may "reproduce information classified as TOP SECRET//SCI that is acquired orally and/or through receipt of documents, into electronic storage media, namely onto a word processing software."

With regard to question 5.a.1 -

The computer system/network/printer that may be used for the reproduction of this information is located within the Defense Razor at the ELC compound and the defense SCIF at [REDACTED]. The specific system that must be used when processing, storing or transmitting any information relating to HVDs is referred to as the Point-2-Point system. This system is now operational according to Mr. [REDACTED], the lead system administrator of the Point-2-Point system for the [REDACTED]. This system enables the defense to scan their notes, create documents, and transmit such documents between both defense sites [REDACTED]. [REDACTED] already coordinated with the defense leadership - believe this was with Mr. Berrigan - to provide training this Friday, June 13, 2008, for the defense teams on the proper use of the Point-2-Point system. This training will include logging onto the system, scanning notes, preparing documents, saving files, printing documents and transmitting data files. If this training is needed earlier, please coordinate directly with [REDACTED] who will be available. If you need our assistance, please let us know.

Note, as a backup solution in the event an unforeseen failure is experienced with the Point-2-Point system located within the Razor, the defense may create their documents with the stand-alone SCI laptops that will be provided by the ELC SSO for each defense team when they return to the ELC. Note: Such laptops may not be transported outside the Razor, other than to the courtroom if needed in support of court proceedings. The ELC SSO must be notified in advance when this is needed since specific security measures must be applied.

Furthermore, if the Point-2-Point system experiences a catastrophic failure that makes it impossible to transmit a document from the defense sites at the ELC compound to the [REDACTED], the defense may print the document and physically hand-carry it IAW the courier procedures described in the ELC SOP. If it is imperative that an electronic version of the document be available when the defense team travels back to the [REDACTED] site, the document on a case by case basis may be saved to disk after coordination with the ELC SSO who will coordinate with the SIO and Information Assurance Manager. If this is permitted, the same courier procedures described in the ELC SOP must be followed.

With regard to question 5.b - N/A

With regard to question 5.c. - There are no prohibitions from our knowledge that prevent the defense from hand-carrying the documents to the judges through the clerk for the judicial branch. Under circumstances when this is not possible, the defense may coordinate with [REDACTED] personnel, [REDACTED] or [REDACTED], who are available to hand-carry documents or make arrangements for the documents to be transmitted by secure or other protected means. If the defense already knows the document is TS/SCI, it can request that they deliver the document to the judge for review. If this takes place at GTMO, a properly cleared defense asset with a courier card can deliver the document to the court in the ELC. However, if the document must be reviewed in [REDACTED] or another location where a judge may be located, [REDACTED] or [REDACTED] will need to make arrangements for the judge to review the document in a facility cleared for TS/SCI.

With regard to question 5.d. - It really appears to be a legal question regarding the nature of MCRE 505. We recommend you refer this question to the Rule for an answer, and would suggest that the defense have a conversation with Trial Counsel about what is expected in the way of a MCRE 505(g) notice. In previous instances involving non-HVD proceedings, an unclassified e-mail was sent to the Judge's clerk advising him or her to review their SIPR for an e-mail referencing the notice of intent to disclose classified information. The e-mail addressed why the information should be considered classified based the existing guidance you quoted in you letter of 10 Jun 08.

Hope this addresses your questions. If not, please let me know. I will be available to entertain questions in person when I visit your facility this afternoon in connection with the Point-2-Point system. While I may not be able to provide answers to all when they deal with a legal matter vice security, I will work to get you the answer.

V/r

[REDACTED]
SIO, OMC

-----Original Message-----

From: Lachelier, Suzanne, CDR, DoD OGC
Sent: Wednesday, June 11, 2008 11:00 AM

To: [REDACTED]
Cc: Federico, Richard, LT, DoD OGC; [REDACTED]; [REDACTED]
Subject: RE: Request for Guidance re: Classified Info ICO U.S. v. Mohammed, et al

Thanks [REDACTED]. Any update on how we can proceed with the current assets is appreciated.
R/

S.M. Lachelier
CDR, JAGC, USN
Office of the Chief Defense Counsel
Office of Military Commissions
[REDACTED]

-----Original Message-----

From: [REDACTED]
Sent: Wednesday, June 11, 2008 10:29 AM
To: Lachelier, Suzanne, CDR, DoD OGC; [REDACTED]
Cc: Federico, Richard, LT, DoD OGC; [REDACTED]
Subject: RE: Request for Guidance re: Classified Info ICO U.S. v. Mohammed, et al

Commander Lachelier,

There are several of us working on the answers, more to follow. [REDACTED] the SIO will be in defense spaces this afternoon working on, among other things, the P2P I think.

Hope to have all we can give you by noon today.

bp

-----Original Message-----

From: Lachelier, Suzanne, CDR, DoD OGC
Sent: Wednesday, June 11, 2008 10:26 AM

To: [REDACTED]; [REDACTED]
Cc: Federico, Richard, LT, DoD OGC; [REDACTED]
Subject: RE: Request for Guidance re: Classified Info ICO U.S. v. Mohammed, et al

[REDACTED],
Thank you for the responses you provided below.

Could we, however, get answers to our original questions that take into account the fact that we do not have a functioning P2P network, that we do not have SCI laptops, and that we do not have SCI thumb drives? As Mr.

[REDACTED] mentioned, the commission judge set a deadline on us for this Friday to file certain materials.

Thank you for your consideration.

R/

S.M. Lachelier
CDR, JAGC, USN
Office of the Chief Defense Counsel
Office of Military Commissions
[REDACTED]

-----Original Message-----

From: [REDACTED]
[mailto:[REDACTED]]
Sent: Wednesday, June 11, 2008 9:08 AM

To: [REDACTED]
Cc: Lachelier, Suzanne, CDR, DoD OGC; Federico, Richard, LT, DoD OGC; [REDACTED]
Subject: FW: Request for Guidance re: Classified Info ICO U.S. v. Mohammed, et al

[REDACTED]
1. Below are answers to para 5 of attached request:

5.a. Yes. Information can be typed into the Point-to-Point (P2P) and a stand alone SCI laptop. Information from the laptop can be transferred (IAW the ELC IA SOP) using a controlled password protected thumb drive for the purpose of printing or by way of electronically transmitting to DC via P2P.

5.a.1. P2P with printer or SCI standalone laptop.

5.a.2. We are unfamiliar with what systems Rosslyn has. Of course, they have the same P2P system and assume a printer.

5.b. n/a

5.c. Not knowing the filing process or what systems are on the other end; we highly recommend "hardcopy".

5.d. For [REDACTED] response.

2. Reference paragraph 3, the DOD regulations governing the process for reproduction and transmittal of SCI are accepted by the Original Classification Authority.

3. Paragraph 4 is correct. External "storage" devices are not approved. The only device approved is an SCI thumb drive for the transfer of information from laptop to P2P. The approved method for processing, transmitting, and storage is an SCI laptop or P2P.

4. There are no copiers in place for reproduction.

[REDACTED]

-----Original Message-----

From: [REDACTED]
Sent: Wednesday, June 11, 2008 6:57 AM
To: [REDACTED] CTR USSOUTHCOM JTFGTMO; [REDACTED] CTR USSOUTHCOM JTFGTMO
Cc: Lachelier, Suzanne, CDR, DoD OGC; Federico, Richard, LT, DoD OGC
Subject: FW: Request for Guidance re: Classified Info ICO U.S. v. Mohammed, et al

FYI, this came in last night. They are working with a very short suspense from the Court so please look at this as soon as you can. I thought they were good to go for all of this stuff at the [REDACTED] down there. If you can, please let me know how to respond to the questions from the JTF GTMO end of things. You can contact Lt Federico directly if you wish but please CC me if you do it that way. I think Commander Lachelier is the lead on the case.

[REDACTED]

From: [REDACTED] CTR, DoD OGC
Sent: Wednesday, June 11, 2008 6:43 AM
To: [REDACTED]
Cc: [REDACTED] DoD OGC
Subject: FW: Request for Guidance re: Classified Info ICO U.S. v. Mohammed, et al

From: Federico, Richard, LT, DoD OGC
Sent: Tuesday, June 10, 2008 5:32 PM
To: [REDACTED] CTR, DoD OGC
Cc: [REDACTED]; Groharing, Jeff, Maj, DoD OGC; Trivett, Clayton, Mr, DoD OGC; [REDACTED]

[REDACTED]

Berrigan, Michael, Mr, DoD OGC; Morris, Lawrence, COL, DoD OGC; Pagel, Bruce, COL, DoD OGC; [REDACTED]; [REDACTED]
OGC; Thomas A. Durkin; Lachelier, Suzanne, CDR, DoD OGC
Subject: Request for Guidance re: Classified Info ICO U.S. v. Mohammed, et al

Mr. [REDACTED]

Attached please find a Request for Guidance on Reproduction and Transmittal of Information Classified as TOP SECRET//SCI During Litigation ICO United States v. Mohammed, et al.

Please let me know if you have any questions or desire to discuss this matter further.

Very Respectfully,

ATTACHMENT G

10 Jun 08

From: S.M. Lachelier, CDR, JAGC, USN, Detailed Military Counsel
Office of the Chief Defense Counsel
R.E.N. Federico, LT, JAGC, USN, Detailed Military
Counsel, Office of the Chief Defense Counsel
T.A. Durkin, Civilian Counsel
To: R. Kohlmann, COL, USMC, Military Judge, Office of
Military Commissions
Via: [REDACTED] USAR, Attorney Advisor, Military
Commissions Trial Judiciary

Subj: REQUEST ON BEHALF OF RAMZI BIN AL SHIBH FOR PRODUCTION OF
TRANSCRIPT AND RECORDING OF PROCEEDINGS OF 5 JUNE 08
ICO UNITED STATES V. MOHAMMED, ET AL.

Ref: (a) R.M.C. 909
(b) *United States v. Mohammed, et. al.*, Schedule for Trial
and Order, dated 9 June 2008

1. The defense respectfully requests production of any and all audio or video recordings created depicting the Commission hearing held on 05 June 2008 in the above-titled case, as well as production of a transcript of the proceedings on the same date.
2. The recordings and transcript are necessary for the defense to review the proceedings in order to assess the state of the record with respect to Mr. Bin al Shibh, and to assist the defense as it and the Commission seek resolution as to whether, pursuant to reference (a), Mr. Bin al Shibh is competent to make a knowing and intelligent waiver of his right to counsel.
3. Per reference (b), the Commission has ordered the defense to file pleadings on R.M.C. 909 matters by 13 June 2008. Any delay in the production of recordings and a transcript will significantly hinder, if not preclude the defense from being able to file pleadings, as ordered.


S.M. Lachelier

Copy to:
Trial Counsel

ATTACHMENT H

Office of Military Commissions
Office of Chief Defense Counsel

IN THE CASE OF
Ramzi bin al Shibh

I, [REDACTED] of the City of Henderson, in the State of Nevada, U.S.A., make oath and state as follows:

1. I am a medical doctor, an adjunct professor of medicine, and a specialist in internal medicine. I have extensive experience in the diagnosis and treatment of people who have survived torture and other forms of physical and psychological abuse. I was also the principal organizer of a United Nations project to develop international standards on the effective investigation and documentation of torture, the Istanbul Protocol.¹
2. It is on the basis of these qualifications and experience, which are explained more fully the appended file "Exhibit A," that I have knowledge of the matters deposed to in this affidavit. Where my knowledge is based on information and belief, I have stated the basis of such information and belief.

BACKGROUND

3. I have been requested by defense attorney Lieutenant Richard E.N. Federico, JAG Corps, U.S. Navy, Office of Military Commission, to provide a statement on 1) the possible effects of torture and ill treatment (cruel, inhuman and degrading treatment or punishment) on an individual's ability to engage in legal proceedings, and 2) international standards for the medical evaluation of allegations of torture and ill treatment.
4. I was not provided any case-specific information regarding allegations of torture and ill treatment for Mr. Ramzi bin al Shibh, any case files, attorney-client notes, or medical records

¹ Office of the U.N. High Commissioner for Human Rights, *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc HR/P/PT/8/Rev.1 (1999), available at <http://www.unhcr.ch/pdf/8istprot.pdf>

for this affidavit as these sources of information are considered classified; nor have I had the opportunity to evaluate Mr. Ramzi bin al Shibh, where he is reportedly detained in Guantanamo Bay Naval Station (GTMO).

5. What I know about Mr. Ramzi bin al Shibh is based on several publically available sources of information.²
6. According to publically available information, Mr. bin al Shibh is a 36 year-old, citizen of Yemen who was the first of several individuals to be identified as the "20th hijacker" in the September 11, 2001 attacks in the United States. He was captured in Pakistan in September 2002 and reportedly held in a secret CIA prison at an undisclosed location until President Bush announced that he and several other high value detainees were transferred to Guantanamo Bay Naval Station in September 2006.

POLLIBLE TORTURE AND ILL TREATMENT

7. U.S. officials have acknowledged that "enhanced interrogations" techniques have been used against high value detainees, including forced nakedness, isolation, sensory deprivation and sensory overload, sleep deprivation, stress positions, exposure to temperature extremes, and exposure to threatening dogs, among others. While some may assume that these "techniques" do not constitute torture or ill treatment, this is clearly not the case. Any of these techniques alone, and certainly in combination as they are routinely practiced, can cause severe and lasting physical and psychological harm.³ The U.S. government has recognized many of these interrogation practices as torture and ill treatment in its annual Country Reports on Human Rights Practices. In addition, these interrogation practices have been recognized as methods of torture and ill treatment by the clinicians and legal experts who developed the UN Manual for the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, or the Istanbul Protocol.
8. In a soon to be released study by Physicians for Human Rights which includes medical evaluations of 11 former detainees held in U.S. detention facilities in GTMO, Iraq and

² See Cooperative Research History Commons, Profile: Ramzi bin al Shibh, available at: http://www.cooperativeresearch.org/entity.jsp?entity=ramzi_bin_al-shibh; Peter Bergen, No Torture, No Exceptions, Washington Monthly. Available at: <http://www.washingtonmonthly.com/features/2008/0801.bergen.html>; and Wikipedia. Ramsi BinalShibh. Available at: http://en.wikipedia.org/wiki/Ramzi_Binalshibh.

Afghanistan, it is clear that the practice of authorized "enhanced interrogation" techniques have occurred in association with unauthorized interrogation practices including severe beatings, sexual assault, suspension, and have been condoned over extended periods of time.⁴ The combined effects of the authorization of "enhanced interrogation" techniques and the apparent condoning of unauthorized interrogation practices suggests that the authorization of some seemingly benign interrogation practices has served to facilitate more extreme forms of abuse.

9. Over the past year, I have had the opportunity to review case files of 12 GTMO detainees. In each case, there was medical evidence that the detainee was subjected to officially authorized "enhanced interrogation" techniques and unauthorized techniques, such as severe beatings, sodomy, sexual molestation and other forms of sexual humiliation, electric shock, suspension, deprivation of basic necessities such as food, water, medical care, toilet facilities, etc., threats of death, harm to family members, and of further torture. These abusive practices have resulted in severe, lasting physical and psychological pain and disability. Persistent symptoms of major depression, posttraumatic stress disorder and other psychological symptoms have the capacity to interfere with an individual's ability to function socially and participate in legal proceedings.
10. In some cases, U.S. officials have acknowledged that high value detainees have been subjected to waterboarding, a practice that is associated with extreme psychological anxiety and possible physical harm, including death by asphyxiation or subsequent infection of the lungs.
11. Though I am not aware of any specific allegation of torture or ill treatment by Mr. Ramzi bin al Shibh, it is hard to imagine that he has not been subjected to the "enhanced interrogation" practices which U.S. officials have publically acknowledged, or additional unauthorized techniques given his "high value" status and the claims of torture by several other high value detainees such as Khalid Sheikh Mohammed. In the soon to be released study by Physicians for Human Rights, all of the 11 detainees experienced torture and ill treatment by U.S. personnel, and none were charged with any crime.

³ Physicians for Human Rights. Leave No Marks: Enhanced Interrogation Techniques and the Risk of Criminality. Physicians for Human Rights. 2007. Available at: <http://physiciansforhumanrights.org/library/report-2007-08-02.html>

12. Given these circumstances, I believe it is likely that Mr. Ramzi bin al Shibh may have experienced torture and ill treatment by U.S. personnel. According to international standards, such crimes require prompt, thorough, independent investigation, including a medical evaluation. If torture and ill treatment were used in the process of obtaining a confession from Mr. Ramzi bin al Shibh, I believe this could also undermine the legal case against him.
13. If, in fact, Mr. Ramzi bin al Shibh has been tortured or ill treated, it is likely that he will demonstrate psychological and/or physical evidence of such abuse. Although there may be considerable variability in psychological effect, torture and ill treatment often result in profound, long-term psychological trauma. According to the Istanbul Protocol, the most common psychological problems are posttraumatic stress disorder (PTSD) and major depression, but may include the following:
- Re-experiencing the trauma
 - Avoidance and emotional numbing
 - Hyperarousal symptoms
 - Symptoms of depression
 - Damaged self-concept and foreshortened future
 - Dissociation, depersonalization, and atypical behavior
 - Somatic complaints
 - Sexual dysfunction
 - Psychosis
 - Substance abuse
 - Neuropsychological impairment

Such psychological symptoms and disabilities can last many years or even a lifetime. It is important to realize that the severity of psychological reactions depends on the unique cultural, social, and political meanings that torture and ill treatment have for each individual, and significant ill effects do not require extreme physical harm. Seemingly benign forms of ill treatment can and do have marked, long-term psychological effects.

⁴ Physicians for Human Rights. Broken Laws, Broken Lives. Physicians for Human Rights. Release date: June 18, 2008.

14. Psychological and neuropsychological impairment resulting from torture and ill treatment also may affect an individual's social functioning, including his/her ability to care for himself or herself, earn a living, support a family, pursue an education, carryout activities of daily living, etc. It can also interfere with an individual's ability to participate in legal proceedings. Also, torture related changes in an individual's thinking, behavior and/or personality may be misinterpreted by others, particularly in legal contexts.

INTERNATIONAL STANDARDS FOR MEDICAL EVALUATIONS OF ALLEGED TORTURE AND ILL TREATMENT

15. Effective investigation and documentation of allegations of torture and ill treatment requires a thorough medical evaluation by qualified, independent medical experts in accordance with international standards established in the Istanbul Protocol (UN Manual on the Effective Investigation and Documentation of Torture and Cruel, Inhuman or Degrading Treatment or Punishment).
16. According to the Istanbul protocol, international standards for effective medical evaluations of torture and ill treatment serve to establish the extent to which an individual's allegations of abuse may correlate with physical and psychological evidence. According to the Istanbul Protocol,⁵ a medical evaluation of alleged torture and ill treatment should include the following:

I. Case information

Date of exam:

Exam requested by (name/position):

Case or report No:

Duration of evaluation: hours, minutes

Subject's given name:

Birth date: Birth place:

Subject's family name: Gender: male/female

Reason for exam: Subject's ID No:

Clinician's name: Interpreter (yes/no), name:

Informed consent: yes/no If no informed consent, why?:

Subject accompanied by (name/position):

Persons present during exam (name/position):

Subject restrained during exam: yes/no; If "yes", how/why?

Medical report transferred to (name/position/ID No.):

Transfer date: Transfer time:

Medical evaluation/investigation conducted without restriction (for subjects in custody): yes/no

Provide details of any restrictions:

⁵ See: Annex IV. Guidelines for medical evaluation of torture and ill treatment. Istanbul Protocol.

II. Clinician's qualifications (for judicial testimony)

Medical education and clinical training

Psychological/psychiatric training

Experience in documenting evidence of torture and ill-treatment

Regional human rights expertise relevant to the investigation

Relevant publications, presentations and training courses

Curriculum vitae

III. Statement regarding veracity of testimony (for judicial testimony)

For example: "I personally know the facts stated below, except those stated on information and belief, which I believe to be true. I would be prepared to testify to the above statements based on my personal knowledge and belief."

IV. Background information

General information (age, occupation, education, family composition, etc.)

Past medical history

Review of prior medical evaluations of torture and ill-treatment

Psychosocial history pre-arrest.

V. Allegations of torture and ill-treatment

1. Summary of detention and abuse

2. Circumstances of arrest and detention

3. Initial and subsequent places of detention (chronology, transportation and detention conditions)

4. Narrative account of ill-treatment or torture (in each place of detention)

5. Review of torture methods.

VI. Physical symptoms and disabilities

Describe the development of acute and chronic symptoms and disabilities and the subsequent healing processes.

1. Acute symptoms and disabilities

2. Chronic symptoms and disabilities.

VII. Physical examination

1. General appearance

2. Skin

3. Face and head

4. Eyes, ears, nose and throat

5. Oral cavity and teeth

6. Chest and abdomen (including vital signs)

7. Genito-urinary system

8. Musculoskeletal system

9. Central and peripheral nervous system.

VIII. Psychological history/examination

1. Methods of assessment

2. Current psychological complaints

3. Post-torture history

4. Pre-torture history

5. Past psychological/psychiatric history

6. Substance use and abuse history

7. Mental status examination

8. Assessment of social functioning

9. Psychological testing: (see chapter VI.C.1. for indications and limitations)

10. Neuropsychological testing (see chapter VI.C.4. for indications and limitations).

IX. Photographs

X. Diagnostic test results (see annex II for indications and limitations)

XI. Consultations**XII. Interpretation of findings**

1. Physical evidence

A. Correlate the degree of consistency between the history of acute and chronic physical symptoms and disabilities with allegations of abuse.

B. Correlate the degree of consistency between physical examination findings and allegations of abuse. (Note: The absence of physical findings does not exclude the possibility that torture or ill-treatment was inflicted.)

C. Correlate the degree of consistency between examination findings of the individual with knowledge of torture methods and their common after-effects used in a particular region.

2. Psychological evidence

A. Correlate the degree of consistency between the psychological findings and the report of alleged torture.

B. Provide an assessment of whether the psychological findings are expected or typical reactions to extreme stress within the cultural and social context of the individual.

C. Indicate the status of the individual in the fluctuating course of trauma-related mental disorders over time, i.e. what is the time-frame in relation to the torture events and where in the course of recovery is the individual?

D. Identify any coexisting stressors impinging on the individual (e.g. ongoing persecution, forced migration, exile, loss of family and social role, etc.) and the impact these may have on the individual.

E. Mention physical conditions that may contribute to the clinical picture, especially with regard to possible evidence of head injury sustained during torture or detention.

XIII. Conclusions and recommendations

1. Statement of opinion on the consistency between all sources of evidence cited above (physical and psychological findings, historical information, photographic findings, diagnostic test results, knowledge of regional practices of torture, consultation reports, etc.) and allegations of torture and ill-treatment.

2. Reiterate the symptoms and disabilities from which the individual continues to suffer as a result of the alleged abuse.

3. Provide any recommendations for further evaluation and care for the individual.

XIV. Statement of truthfulness (for judicial testimony)

For example: "I declare under penalty of perjury, pursuant to the laws of (country), that the foregoing is true and correct and that this affidavit was executed on (date) at (city), (state or province)."

XV. Statement of restrictions on the medical evaluation/investigation (for subjects in custody)

For example: "The undersigned clinicians personally certify that they were allowed to work freely and independently and permitted to speak with and examine (the subject) in private, without any restriction or reservation, and without any form of coercion being used by the detaining authorities"; or "The undersigned clinician(s) had to carry out his/her/their evaluation with the following restrictions:"

XVI. Clinician's signature, date, place

XVII. Relevant annexes

A copy of the clinician's curriculum vitae, anatomical drawings

17. Legal experts, including attorneys for the prosecution and the defense and adjudicators are not qualified to assess medical evidence of torture and ill treatment. In order for clinicians to become qualified as experts in the assessment of medical evidence of torture, a number of factors should be considered including, knowledge of the physical and psychological effects of torture, specific interview considerations, how to conduct a physical and medical evaluation, how to interpret such information, and one's prior experience in conducting medical evaluations of alleged torture and ill treatment.
18. Effective medical evaluations of torture often require considerable time to conduct. They require an opportunity to interview the alleged victim and to conduct both physical and psychological examinations, and possibly to obtain additional diagnostic test and/or consultations. In some cases, psychological symptoms may have a neurologic (physical) basis (i.e. cases where brain injury has occurred) and therefore require and neuropsychiatric evaluation as well.

CONCLUSION

19. Based on my experience of evaluating medical evidence of torture and ill treatment in hundreds of cases, and particularly a number of GTMO cases, I believe that it is likely that Mr. Ramzi bin al Shibh has experienced torture and/or ill treatment by U.S. personnel.
20. I therefore recommend that Mr. Ramzi bin al Shibh be evaluated by a qualified medical expert of his choosing. In addition, all relevant sources of information such as detainee interrogations logs, photographs and/or videotapes of interrogations, and complete records of behavioral science consultants and medical records should be provided to the medical evaluator.
21. I declare under penalty of perjury, pursuant to the laws of the United States, that the foregoing is true and correct and that this affidavit was executed on June 12, 2008, at Henderson, Nevada.



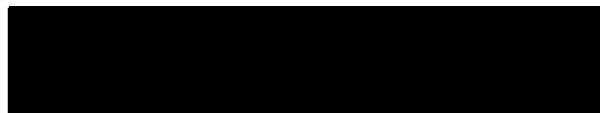


EXHIBIT A**QUALIFICATIONS OF** [REDACTED]

1. 1. My medical training and experience are as follows: I received a Bachelor of Science Degree from Villanova University in 1979. In 1980, I received a Master of Science Degree in Physiology from Georgetown University. In 1985, I received both a Ph.D. in physiology from Georgetown University, and my M.D. from the Georgetown University School of Medicine.
2. My internship and residency in internal medicine was at the University of Minnesota Hospitals and Clinics and was from July 1985 to June 1986 and April 1987 to April 1989.
3. I was the Chief Resident at the Veterans Administration (V.A.) Medical Center in Minneapolis, Minnesota, from June 1989 to June 1990.
4. From July 1991 to July 1993, I was a Clinical Scholar with the Robert Wood Johnson Clinical Scholars Program at Stanford University and the University of California, San Francisco, and Attending Physician at the V.A. Medical Center in Palo Alto.
5. I have taught as a clinical instructor in adult or internal medicine at the following locations:

V.A. Medical Center, Palo Alto, California, Department of Medicine (July 1991 to October 1994)

Mendi Provincial Hospital, Papua New Guinea (July 1990 to February 1991)

V.A. Medical Center, Minneapolis, Minnesota (June 1989 to June 1990)

Site 2 South (American Refugee Committee refugee camp); Thailand (July 1986 to April 1987)

6. My honors and awards include:

University of Minnesota, Department of Medicine 2005 Distinguished Alumni Award

The Center for Victims of Torture 2004 Eclipse Award for extraordinary service on behalf of torture survivors

Certificate of Commendation for Volunteer Efforts to Aid Refugees, State of Minnesota, Governor's Office, 1989

Upjohn Achievement Award for Outstanding Research and Scholarship, 1985

Joseph Collins Foundation scholarship for Academic Achievement and Proficiency in the Arts and Letters, 1984, 1985.

7. I am currently licensed by the State of California as an M.D. and Board Certified in internal medicine by the American Board of Internal Medicine.
8. Presently, I am the Senior Medical Advisor for Physicians for Human Rights (PHR), based in Cambridge, Massachusetts, an organization that brings the scientific knowledge and skills of the medical sciences to the investigation and prevention of violations of international human rights and humanitarian law. During the past fifteen years, I have represented PHR and/or supervised medical fact-finding investigations to Thailand, Punjab, Kashmir, Turkey, South Africa, Afghanistan, Albania, Macedonia, Kosovo, Chechnya, Sierra Leone, Nigeria, Mexico, Botswana, Swaziland, Iraq, Sudan and the United States and documented the health consequences of a wide range of human rights abuses. In the course of this work, I evaluated medical evidence of torture in several hundred individuals.
9. Since 1994, I've taught "Health and Human Rights" at the University of California, Berkeley, School of Public Health.
10. Between 1991 and July 1997, I was Medical Director of Survivors International, San Francisco, California, an organization that provides medical and psychological care to survivors of torture from around the world. Through this work, I have examined and participated in the care of more than 100 survivors of torture.
11. I have qualified as a medical expert in US Immigration Courts regarding assessment of physical and psychological consequences of torture on more than 80 occasions. Also, I have

qualified in US Immigration Courts on numerous occasions to testify on human rights conditions in countries where I have conducted human rights investigations.

12. From 1996 to 1999, I was the principal organizer of a project to develop a UN manual on the effective investigation and documentation of torture and ill treatment. The Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol), was the result of 3 years of analysis, research, and drafting undertaken by more than 75 forensic doctors, physicians, psychologists, human rights monitors and lawyers who represent 40 organizations and institutions from 15 countries. The Protocol was published by the United Nations in 2001 and represents the first set of international guidelines for the effective investigation and documentation of torture and ill treatment. The Istanbul Protocol also outlines minimum standards for state adherence to ensure the effective documentation of torture in its "Principles on the Effective Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment." On April 20 2000, the United Nations Commission on Human Rights unanimously annexed the Principles included in the Istanbul Protocol to resolutions E/CN.4/RES/2000/32 and E/CN.4/RES/2000/43.
13. I have organized and participated in Istanbul Protocol implementation projects in Mexico, Sudan, Sri Lanka, Uganda, George, Ecuador, Egypt, The Philippines and Kenya.
14. I have qualified as a medical expert in US, Canadian and British Immigration Courts regarding the assessment of physical and psychological consequences of torture on many occasions.
15. I have served as a public member of the United States delegation to the Organization for Security and Cooperation in Europe (OSCE) to speak as an expert on torture practices in OSCE countries and the physical and psychological consequences of torture and ill treatment. Testimony available at: C:\Documents and Settings\Vincent Iacopino\My Documents\PHR\Testimony & Statements PHR\OSCE Testimony.htm
16. I currently serve on as a peer reviewer for the Journal of the American Medical Association, The Lancet, Health and Human Rights, and Torture.
17. In addition to authoring a number of basic science and clinical publications, I am the author of 57 publications on health and human rights topics, and approximately 28 of these are specifically on torture related topics, including:

Lustig SL, Kureshi S, Delucchi K, Iacopino V, Morse S. Asylum grant rates following medical evaluations of maltreatment among political asylum applicants in the United States. *Journal of Immigrant and Minority Health*, 2008; 10(1). In Press.

Rubenstein L, Pross C, Davidoff F, Iacopino V. Coercive US interrogation policies: a challenge to medical ethics. *JAMA*. 2005; Accepted for Publication: Sept 28 or Oct 12 issue.

Iacopino V. Medical Evaluations of Asylum Seekers. *Virtual Mentor: Ethics Journal of the American Medical Association*. September 2004, Volume 6 Number 9. Available at: <http://www.ama-assn.org/ama/pub/category/12785.html>.

Reis C, Ahmed AT, Amowitz LL, Kushner AL, Elahi M, Iacopino V. Physician participation in human rights abuses in southern Iraq. *JAMA*. 2004;12:1480-1486.

Moreno A, Heisler M, Keller A, Iacopino V. Documentation of Torture and Ill Treatment in Mexico: A Review of Medical Forensic Investigations, 2000 – 2002. *Health and Human Rights*. 2003;7(1):29-50.

Heisler M, Moreno A, DeMonner S, Keller A, Iacopino V. Assessment of Torture and Ill Treatment of Detainees in Mexico: Attitudes and Experiences of Forensic Physicians. *JAMA*. 2003;289:2135-2143.

International Dual Loyalty Working Group. Dual Loyalty & Human Rights: In Health Professional Practice: Proposed Guidelines and Institutional Mechanisms. *Physicians for Human Rights*. 2003.

Laws A, Iacopino V. Police torture in Punjab, India: an extended survey. *Health and Human Rights*. 2002; 6(1):195-210.

Iacopino V, Keller A, Oksenberg D. Why torture must not be sanctioned by the United States: It undermines our humanity and does not make society safer. *West J Med* 2002 176: 148-149.

Amowitz L, Iacopino V. A Survey of Human Rights Abuses Among New Internally Displaced Persons Herat, Afghanistan. Physicians for Human Rights, April 2002

Peel M, Iacopino V (Editors). The Medical Documentation of Torture. Greenwich Medical Media Ltd., London; 2002: pp.1-227.

Amowitz LL, Reis C, Hare Lyons K, Vann B, Mansaray B, Akinsulure-Smith AM, Taylor L, Iacopino V. The Prevalence of War-Related Sexual Violence and Other Human Rights Abuses Among Internally Displaced Persons in Sierra Leone. JAMA. 287(4):513-521, January 23/30, 2002.

Jacobs U, Iacopino V. Torture and its consequences: a challenge to neuropsychology. Professional Psychology: Research and Practice. 2001;32(5): 458-464.

Iacopino V, Frank MW, Bauer HM, Keller AS, Fink SL, Ford D, Palin DJ, Waldman R. A Population-based Assessment of Human Rights Abuses against Ethnic Albanian Refugees from Kosovo. American Journal of Public Health. 2001;91(12)2013-2018.

Iacopino, V, Allden K, Keller A. Examining Asylum Seekers: A Health Professional's Guide to Medical and Psychological Evaluations of Torture. Physicians for Human Rights. August, 2001.

Rubenstein LS, Ford D, Mach O, Cohen A, Burkhalter H, Ahmadi R, Vassiliev M, Nawaz H, Iacopino V. Endless Brutality: War Crimes in Chechnya. Physicians for Human Rights. May 2001;1-143.

Iacopino V. Commentary: Health Professionals cannot be silent witnesses. Western Journal of Medicine. 2000;172:304-305.

Iacopino V, Ozkalipci O, Schlar C. The Istanbul Protocol: International Standards for the Effective Investigation and Documentation of Torture and Ill Treatment. *The Lancet*. September 25, 1999; pp. 1117.

Iacopino V., Ozkalipci, O., Schlar, C., Allden, K., Baykal, T., Kirschner, R. et al. Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (The Istanbul Protocol). Office of the High Commissioner for Human Rights. New York and Geneva, United Nations Publications HR/P/PT/8. 2001. Available at: <http://www.unhchr.ch/pdf/8istprot.pdf>

Iacopino V, Frank MW, Keller AS, Fink SL, Pallin DJ, Waldman RJ, et al. War Crimes in Kosovo: A Population-Based Assessment of Human Rights Violations Against Kosovar Albanians. Boston, MA: Physicians for Human Rights; August, 1999.

Chapman AR, Rubenstein LS, Iacopino V, Geiger J, Bloche G, Hatch J, Lawrence R, Nichols B and Secundy M. Human Rights and Health: The Legacy of Apartheid. Washington, DC. American Association for the Advancement of Science; 1998: 1-217.

Iacopino V, Treatment of Survivors of Political Torture: Commentary. *The Journal of Ambulatory Care Management*. 1998; 21(2):5-13.

Iacopino V, Turkish Physicians Coerced to Conceal Systematic Torture. *The Lancet*. 348, November 30, 1996.

Weinstein, H., Dansky, L. and Iacopino V. Torture and War Trauma in Primary Care Practice. *Western Journal of Medicine*. 1996; 156(3):112-118.

Iacopino V, Heisler M, Pishever S, and Kirschner RH. Physician Complicity in Misrepresentation and Omission of Medical Evidence in Post-Detention Medical Examinations in Turkey. *JAMA*. 1996; 276:396-402.

Iacopino V, Rosoff R, and Heisler M. Torture in Turkey and Its Unwilling Accomplices. Physicians for Human Rights. August, 1996

Gossman P, Iacopino, V. Dead Silence: The Legacy of Human Rights Abuses in Punjab. Physicians for Human Rights and Human Rights Watch. May, 1994.

Gossman P, Iacopino V. Crackdown in Kashmir: torture of detainees and assaults on the medical community. Physicians for Human Rights and Human Rights Watch. January 1993.

18. I have evaluated medical records of other detainees held in Guantanamo Bay Naval Station using Istanbul Protocol standards and provided medico-legal affidavits for US Federal Court.
19. I also supervised a medico-legal investigation of torture and ill treatment by US officials among individuals formerly detained in Guantanamo Bay Naval Station, Iraq and Afghanistan. The findings of this investigation are based on medical evaluations of former detainees and will be published in a Physicians for Human Rights report provisionally entitled: *Broken Laws, Broken Lives: Medical Evidence of Systematic Torture by US Officials*.
20. I have conducted more than 100 presentations in the past fifteen years, many of which have focused specifically on the medical and psychological consequences of torture.

ATTACHMENT I

NPR
June 2, 2008

Khalid Sheikh Mohammed To Face Military Tribunal

Talk Of The Nation (NPR), 2:00 PM

NEAL CONAN: This is Talk of the Nation. I'm Neal Conan in Washington. Before his capture, Khalid Sheikh Mohammed boasted about his part infamous crimes. He claimed that he proposed the ideas for the attacks on 9/11 to Osama bin Laden, and that he personally beheaded American journalist Daniel Pearl. After years as a prisoner, he and four alleged accomplices will be formally arraigned on Thursday at Guantanamo Bay in Cuba. It'll be the first time the public will get a look at Mohammed since we saw pictures of a sleepy, disheveled man wearing an oversized white T-shirt following his capture in Pakistan more than five years ago.

For some, the proceedings represent a long delayed opportunity to bring some of the men who organized 9/11 to justice. Others see them as a trial of American justice itself. Defense attorneys argue their clients were tortured, that they've been denied the opportunity to mount a meaningful defense, and that the military tribunals are stacked against them. NPR's Jackie Northam heads to Guantanamo later this week to cover the proceedings and joins us shortly. We'll also be joined by a general at Guantanamo Bay who will defend the way the prisoners there are treated.

We want to hear from lawyers today. If you have questions about the military commissions at Guantanamo Bay, our number is 800-989-8255. Email us, talk@npr.org. You can also join the conversation on our blog at npr.org/blogofthenation. Later in the program, the cultural imperialism of boomers is on the Opinion Page this week, and we remember Bo Diddley, who died earlier today. But first military tribunals. We'll hear arguments from both sides in a few minutes.

We begin with Jackie Northam, though, and she joins us here in Studio 3A. Jackie, always good to have you on the program.

JACKIE NORTHAM: Thank you, Neal. Thank you.

CONAN: And who are the defendants beside Khalid Sheikh Mohammed and what are the charges?

NORTHAM: The other one after Khalid Sheikh Mohammed is Ramzi bin al-Shibh, and then there's Walid bin Attash, Ali Aziz Ali and Mustafa al-Hawsawi. All of the men are charged - along with Khalid Sheikh Mohammed, are charged with terrorism. They're charged with murder, in fact, 2,973 counts of murder, and that's one for each person who died in the 9/11 attacks. Most of the men are also charged with hijacking as well. And they face the death penalty if they are prosecuted.

CONAN: Wasn't there a fifth defendant?

NORTHAM: There was. It was a man named Kahtani, and they did not press charges or level charges against him. It was decided at the last not to do it, never explained why, except, you know, when you've been following this a long time, you know, there were very serious charges that he had been tortured and that type of thing, and that he wasn't mentally capable of facing a trial at this point. And so those charges - he was not charged in the end. And always, you're right, they thought that he would be, but he wasn't.

CONAN: He was the so-called 20th hijacker.

NORTHAM: That's right, yes.

CONAN: Now, have the men been tortured? We heard that Khalid Sheikh Mohammed, the CIA admits that he was waterboarded. They say that wasn't torture, but it is in a lot of peoples eyes.

NORTHAM: Right. Um, yes, you know, these men were held for several years in, you know, these secret CIA black prisons that are, you know, spread all over the world, and when it was announced they were going to Guantanamo Bay, they were being sent there in 2006, in fact, it was the president that said it. And he basically admitted that the coercive techniques, interrogation techniques, had been used at these sites.

So they - you know, it wasn't pointed out individually what had happened to each man, but the fact, again, these coercive techniques are used at these sites and that these men were in those sites. If you put two and two together, I mean, you're probably going to - and that's really going to be a big part of these trials that's coming up here, Neal, is, you know, whether this evidence can be introduced if it was gained through coercive techniques - dot, dot, dot - torture.

CONAN: Mm-hm. and that's been a controversy. Some of the prosecutors, in fact, have resigned over this.

NORTHAM: Well right. In fact the chief prosecutor, Colonel Morris Davis, resigned over it. And oddly enough, he appeared at a trial for one of the detainees. Now, he was a man - and he still does, he believes in the system. He did not believe in, what was happening, when one of our guests that's going to be coming up in a few minutes, Brigadier General...

CONAN: Hartmann.

NORTHAM: Tom Hartmann, thank you. He - Colonel Davis, when he was testifying at Hamdan's trial said, look, we - before, we didn't want to use any evidence that we knew had been gained through, you know, one of these coercive techniques, these - during interrogation. He said that Colonel - pardon me, General Hartmann - you need a flow chart for this, don't you? - that General Hartman had decided, no, in fact, that evidence could be used.

So, you're right. I mean, it's - even within the prosecution itself, there's a huge debate whether this stuff should be admitted. I talked with General Hartmann the other day, and he said, really, it's the rules of evidence for these military commissions that course - that any evidence that has been gained through coercion can be admitted.

CONAN: Can be admitted.

NORTHAM: Can be admitted, but there is a difference between that and torture in their minds.

CONAN: Will there be secret evidence presented?

NORTHAM: Oh, yeah. Yes, definitely. In fact, that's going to be a real problem for us journalists. You know, at this moment, (unintelligible), I talked with the lawyer for Ramzi bin al-Shibh, and he says anything that comes out of his client's mouth is considered classified, top secret. So how this is going to be presented into the court, beyond the court, you know, for anybody trying to listen in, like the journalists, it's going to be a real challenge. We'll see how that unfolds.

CONAN: Are you going to be able to see these proceedings? Are they going to be on TV?

NORTHAM: No, not - they - well, there'll be closed-circuit TV. So journalists down there will be allowed to - having said that, they were doing these trial runs for the trials, and the power kept going out. You know, the whole system failed, but hopefully - and you know, Neal, you were talking about the last time anybody has seen any of these people, it's just been these grainy photographs of, you know, Khalid Sheikh Mohammed, moments after he's awoken, and that type of thing.

It really is going to be historic, I mean, because these are the big fish. Everybody up until now that they've tried, the dozen or so, you know, there's like a driver for bin Laden maybe, or somebody who, you know, trained at a camp in Afghanistan and that. But these guys were key. These guys helped plan and organize the 9/11 attacks. These guys are important, and there's a real question is, why them? Why are they doing it now, just months before the election, just weeks before Supreme Court decision about habeas? That type of thing, that's come into it.

CONAN: A lot of questions about that, and...

NORTHAM: Yeah.

CONAN: Why has it taken so long?

NORTHAM: To get these fellows...?

CONAN: Yes.

NORTHAM: On board? Well, actually, these guys have been fast-tracked. They've only showed up at Guantanamo about a year and a half ago. Let's not forget, others have sat there for, what? Six years and still haven't been charged, hundreds of people. So, you know, they had to get them out of the CIA sites, but really, that's one of the questions. Why are these guys moving along so fast? Rather than - why isn't it taking so long?

CONAN: And one question before we get to General Hartmann, and that is, an arraignment, what part of the proceeding is that?

NORTHAM: It's the very first part of it. Really, what it is is the charges will be read out. They'll be asked if they are happy with their representation and that type of thing. And what's interesting about this is the detainees at Guantanamo who do go to trial, the very few, they have to go to their arraignment. They have to go to their arraignment. Last week, there was a detainee that came through, and he was literally dragged into courtroom kicking and screaming. He did not want to - now, Ramzi bin al-Shibh, he has not appeared for any of his other little hearings that they have to determine whether or not...

CONAN: Procedural hearings.

NORTHAM: Right, exactly. It will be interesting to see what happens with these guys.

CONAN: Well joining us now by phone from Guantanamo Bay, Cuba, is U.S. Air Force Brigadier General Thomas Hartmann, legal advisor to the convening authority at the Department of Defense, Office of Military Commissions, and General Hartmann, it's very good of you to be with us today.

Brigadier General THOMAS HARTMANN (Legal Adviser, Convening Authority, Office of Military

Commissions, U.S. Department of Defense): Good afternoon, Neal.

CONAN: Good afternoon. Tell us - I know that you've been involved in this. A lot of people, with respect, believe these proceedings can't possibly be fair. Why do you feel the opposite?

Brig. Gen. HARTMANN: These proceedings will be extraordinarily fair. They are literally unprecedented in the history of warfare. The types of protections we're making available to these accused, in so many ways, mirror the very rights we provide to our soldiers, sailors, airmen and Marines, Coast Guard. It's just tremendous. If you compare these rights and protections that we provide to these people, they outdistance the International Criminal Tribunals. They far outdistance what we had in Nuremburg, and as I said, they virtually mirror what we have in the military justice system. It's quite extraordinary.

There's some differences, of course, because of the nature of the global War on Terror. But the rights and protections we provide, in terms of attorney rights, support, right to remain silent in the courtroom, right to see every piece of evidence that goes to the finder of facts, right to call witnesses, right to confront witnesses, right to make motions, right to challenge judges and the jury, those are the same basic rights that you would find in the United States. Those are the same basic rights that you would find in any Article Three court, in any military court, and you're finding those in the military commissions. So it's a tremendous reflection on the American people. It's a tremendous reflection on the American justice system.

CONAN: People on the other side, as you know, the defense attorneys say they've been denied access to their clients, that their motions for discovery have been denied, that they are - that they can't - they feel that they don't have the very basis of presenting a meaningful defense.

Brig. Gen. HARTMANN: Well, the access to their clients is run by Joint Taskforce Guantanamo, which controls the detention facilities here. But the information that I've received is that they have given - they have been given access to their clients on a fairly consistent basis. There have been, I believe, something like 200 visits last year by commissions counsel during the entire year, and this year it has doubled. And there are also counsel for habeas protection and things like that.

So, it's just as you would have in any normal detention facility. There are controls that are designed for the safety of the detention population and for the prison guards, and so forth. So that's a fairly regulated procedure in order to insure the safe and humane treatment of the accused in these cases, and that's paramount with regard to their treatment. So, in terms of giving access to the defense counsel, that goes through an established procedure that the defense counsel know. So there's been no denial, as far as I'm concerned, and as far as I know.

And in terms of discovery, the discovery rights, Neal, are guided, as they are in any trial, by the rules that apply to that court system. These are very similar to military discovery rules, military court-martial discovery rules, and the defense makes a request. If they are unhappy with the results of that discovery, they go to the judge, which is a trial system that makes sure - that makes absolutely sure that the system is fair, because you have a seasoned military judge. All these judges have a great deal of experience to make sure that fairness applies.

CONAN: And another question that many people will have, is presenting evidence of confessions that were extracted what the defense attorneys, indeed, the defendants, will say was torture?

Brig. Gen. HARTMANN: And the president of the United States has confirmed and reconfirmed that

the United States does not engage in torture. Any statements obtained by torture are simply inadmissible in these tribunals. It's clear as can be. It's spelled out in black and white. To the extent that there is an issue with regard to the method by which evidence was obtained, and that's a matter of evidence admissibility, Neal, the court will decide that.

The defense will make their arguments. The prosecution will make their arguments in open court. They will argue before the judge on the facts, the law, the evidence, and the judge will decide whether that evidence fits within the rules that are prescribed by this proceeding. And he will either admit it or exclude it.

CONAN: And the...

Brig. Gen. HARTMANN: That, by the way, is what we call a trial. And that's the fairness of this system. Because a trial in America, a trial in any place, is a clash of ideas, a clash of fact, a clash of law, a clash of view, and we allow that clash to occur with every ounce of both side's energy, and enthusiasm, and intensity, and out of that comes what we think is the best result.

CONAN: General Hartmann, stay on the line, if you would. We have to take a short break. We'll hear more from him in just a moment on the prosecution's case. Plus, in a few minutes, we'll be hearing from the other side, and Jackie Northam is still with us here in the studio. If you'd like to join the conversation about the upcoming trials of five men accused of the crimes of 9/11, give us a call, 800-989-8255. Email us, talk@npr.org I'm Neal Conan. It's Talk of the Nation from NPR News.

(Soundbite of music)

CONAN: This is Talk of the Nation. I'm Neal Conan in Washington. On Thursday, five men charged with organizing the attacks of 9/11 will be formally arraigned - arraigned, excuse me - at Guantanamo Bay in Cuba. They include Khalid Sheikh Mohammed, the alleged mastermind. Some see as an opportunity for justice. Defense attorneys argue there will be no opportunity for justice in the military tribunal system.

Our guests are NPR national security correspondent, Jackie Northam, also with us, Brigadier General Thomas Hartmann. In a moment, we'll hear from the other side. If you have questions about the military commissions at Guantanamo Bay, give us a call. Our number is 800-989-8255, email is talk@npr.org, and you can read what other listeners have to say on our blog at npr.org/blogofthenation. And let's see if we can get a caller on the line, and this is Evan, and Evan's with us from Pinedale in Wyoming.

EVAN (Caller): Hi there.

CONAN: Hi.

EVAN: Thank you for taking the call.

CONAN: Yes, go ahead.

EVAN: I guess, really, my point is, and I'm an attorney, that I think we're putting a lot of apples before the cart. The basic fundamental structure of a legal system is the credibility that it has with the people. And we have to remember that this tribunal involves international suspects, and it involves all the citizens of those countries. And right now, I think all these very technical arguments about procedural rules are really lost on all of these folks.

What they're looking at is really the history of the conduct of this administration in the pursuit of this war. And so, I really have to - and I really can't speak for these people, because I'm an American, but my impression is that this result may not sit too well, or at least how it's going about, with a lot of folks in these countries. And that's a very - that's basically the fundamental guarantee of law is that this is a credible process.

CONAN: Yeah, not merely justice, but that it be perceived as justice. General Hartmann?

Brig. Gen. HARTMANN: I fully agree with you, Evan. The fundamental guarantee of this process is that it is not simply a theoretical guarantee of justice, but it's a real guarantee of justice and fairness. And perhaps some of the cases have fallen below the radar screen, but the Hamdan case is another case that is ongoing. The 9/11 case will go into the arraignments later this week.

But the Hamdan case, for example, as a case that has been going on for some time, and if you walked into the courtroom during the Hamdan case, you would see five counsel at Mr. Hamden's table, detailed military counsel, a Department of Defense civilian, and three civilian lawyers, two from a distinguished law firm on the West Coast, and Mr. Swift, who will be with you on the rest of the program.

The - and that's what you see in the courtroom, and you see the accused being able to speak to the judge, and you see the accused being able to exercise his rights, and you see the accused being able to call witnesses, and the debate...

EVAN: Five years later, sir, (unintelligible).

Brig. Gen. HARTMANN: I certainly wouldn't argue that the process should have moved faster. I'm a big proponent for moving the process as rapidly as it possible can, under the fundamental precept, of course, that you have to be fair, just...

EVAN: You arrested him. That fact is very largely - and really this tribunal process seems to ignore those realities. I'd also add that...

Brig. Gen. HARTMANN: (Unintelligible).

CONAN: Well, let's...

EVAN: Internationally speaking, if the Supreme Court is shooting down a lot of the so-called procedures that we've been hearing for the last five years, that also weighs very heavily. And these are, you know, this is a basic point about lawyers. We're not very popular in this country, and I suspect we might be less popular in the rest of the world. So, I'm not really sure that, you know, piling up a bunch of attorneys really means anything to these folks and the rest of the world.

CONAN: All right. Evan, thanks very much for the phone call. Appreciate it.

EVAN: Thank you, sir.

CONAN: General Hartmann, what happens after the arraignment? How long are these trials expected to last?

Brig. Gen. HARTMANN: Evan, I mean, Neal, you can never predict how long a trial is going to last. The arraignments occur within 30 days of the service of the charges on various people. Mr. Hamdan, for

example, was - I believe his charges were referred in May of 2007, and now he is being - his trial is set for July of 2008. So, they take time. They're very complicated.

The 9/11 involves five accused who are jointly to be tried in capital cases. So I expect it to be complex. The stakes are high. The parties are very much engaged. There are a total of, I think, 18 counsel on the case, two military counsel per accused, and eight of the civilian counsel, and there are five military counsel on - or five prosecution counsel. So, it's going to be what a trial should be, a very intense, focused, driven, process to achieve the truth, to achieve fairness, to achieve justice. And we'll do that as transparently as humanly possible.

NORTHAM: If I could just interject a little bit, Neal...?

CONAN: This is Jackie Northam, General. Go ahead, Jackie.

NORTHAM: General, hi, you know, I think the caller has made a valid point, because anywhere in the world, Guantanamo is really seen as this - sort of this injustice, American injustice, rather than justice, and actually, General Hartmann and I discussed this the other day, is that it doesn't matter, even if this thing was the epitome of pure justice, the perception now is so tainted that how, you know, how will this be viewed throughout the world. The other thing, though, when you were talking about how long a trial will take, what is coming up is a Supreme Court decision on whether these men down in Guantanamo are entitled to challenge their detention in the U.S. courts. If they come down...

CONAN: In federal courts.

NORTHAM: In federal courts, U.S. courts, yes, federal courts. And it depends on what that decision is, because we could see things change dramatically if, in fact, you know, it comes down in favor of being able to do that.

CONAN: We have this email question from Parker. What would happen if any defendants found not guilty? Does it mean that they would be released?

Brig. Gen. HARTMANN: There are two systems at Guantanamo Bay. One is the detention system. There are about 270 people here at Guantanamo who are being detained because they are enemy combatants who pose a danger to our soldiers, sailors, airman and Marines on the battlefield. It's not exactly like a POW status, but it's that concept, that you just remove those people from the battlefield to prevent them from harming our soldiers.

The second sub-setup of that is these commission trials that - my expectation is - what I've been advised is that they will try about 80 of these accused, and within that sub-set - so that's 80 of the 270. If there's an acquittal in any of the cases, the accused remains a detainee under the system down here. So to the extent that others determine that he remains a danger to our soldiers on the battlefield, he could still be detained. But that's separate from the commission process.

CONAN: And that could be indefinitely?

Brig. Gen. HARTMANN: Well, it depends upon the nature of the hostilities. You would detain someone, presumably, during the duration of the hostilities, and that's something that our national leaders have to determine, as to whether we are continuing in the global War on Terror at any given point.

CONAN: General Hartmann, thank you very much for your time today. We appreciate it.

Brig. Gen. HARTMANN: Thank you, Neal. Thank you, Jackie.

NORTHAM: Thank you, General.

CONAN: That's Brigadier General Thomas Hartmann, the legal advisor to the convening authority at the Department of Defense, and he joined us by phone from Guantanamo Bay. Joining us now from the studios of Georgia Public Radio in Atlanta is Lieutenant Commander Charlie Swift, a retired Naval Officer, visiting associate professor at Emory University, also the attorney for Salid Ahmed Hamdan, the man in custody at Guantanamo Bay. You heard General Hartmann refer to him earlier. Lieutenant Commander, nice to have you on the program today.

Lieutenant Commander CHARLIE SWIFT (Retired, U.S. Navy; Counsel, Salid Ahmed Hamdan): Nice to be with you, Neal.

CONAN: And let me ask you about some of the proceedings. You don't represent any of the five men being arraigned on Thursday, but your case is a little bit more advanced. Have you had access to your client? Have you had discovery motions respected? Have you been able to mount a meaningful defense?

Lt. Cmdr. SWIFT: I think, in Hamdam's case, we have had access to our client fairly consistently. I understand that that same level of access has not been provided to the attorneys in the high-value detainee cases. Whether that changes after the proceeding get going or not we'll have to see. We have filed for discovery. We haven't received all of it. And what was really curious to me about what General Hartmann said regarding coerced statements was that the government has not permitted us access to the high-value detainees. That was something we particularly wanted to go, because, as was pointed out, KSM is considered a founding member of al-Qaeda...

■ CONAN: That's Khalid Sheikh Mohammed, yes.

Lt. Cmdr. SWIFT: That's right, someone who would know what Mr. Hamdan's role was in the process. And so we wanted to talk to Khalid Sheikh Mohammed about what Mr. Hamdan did in relationship to 9/11 or any other al-Qaeda activities. The government absolutely opposed that. They said even for us to talk to him about pre-9/11 conduct would pose a risk to the national security. Basically, exactly what Jackie said, that anything KSM says is so highly classified you can't listen in on it. Now, that asks a real question, as to whether this is going to be an open trial or not. It may be an open trial, for when the government speaks, but when the defense speaks, or Khalid Sheikh Mohammed speaks, they'll classify that information.

And that goes back to Evan. If what happens down there - we're starting way behind. If what happens down there is a one-sided presentation of the evidence where the detainees have no right to speak where the world can hear - they would be able to speak inside the hearing proceedings, but it's been set up so that anything they say can be immediately deleted so the press can't listen to it. And I understand Jackie's frustration, and I have the same frustration, because in my view, Khalid Sheikh Mohammed may well prove that my client's innocent.

The you know, as that proceeding goes on, if that's how we're having a full, fair and open process, where we only hear one side, the world is not going to buy this. Moreover, the general indicated that, gee, these proceedings were exactly like U.S. proceedings. They were so similar, and they were highly above international proceedings. No international proceeding would ever admit a statement obtained by

UNITED STATES OF AMERICA

v.

KHALID SHEIKH MOHAMMED, WALID
MUHAMMAD SALIH MUBARAK BIN
'ATTASH, RAMZI BIN AL SHIBH, ALI
ABDUL AZIZ ALI, MUSTAFA AHMED
ADAM AL HAWSAWI

Defense Motion
for Special Relief for an Enlargement of Time
to File Motions

23 June 2008

1. **Timeliness:** This Motion is timely filed within the deadline prescribed by the Commission in the Schedule for Trial and Order, dated 9 June 2008 ("Trial Schedule").
2. **Relief Sought:** At the direction of, and with the consent of, the *pro se* accused Khalid Sheikh Mohammed, Walid Muhammad Salih Mubarak Bin Attash¹, standby counsel respectfully request the Commission to grant an enlargement of time to file discovery and law motions, currently due, pursuant to the Trial Schedule on 11 July 2008. Counsel for Mr. Aziz Ali², Mr. Al Hawsawi and Mr. Bin al Shibh³ join the *pro se* accused in their request for relief. The defense requests the Commission adopt the following litigation schedule:
 - a. 10 July 2008: Hearing at U.S. Naval Base, Guantanamo Bay, Cuba (GTMO) regarding counsel for Mr. Al Hawsawi's request for unspecified relief.

Respectfully request the hearing be canceled due to the withdrawal of the motion to sever by counsel for Mr. Al Hawsawi;

¹ This motion is filed in advance of Mr. Bin 'Attash's permission to preserve his right to file jointly with the co-accused. Stand-by defense counsel have a meeting with Mr. Bin 'Attash on Wednesday, 25 June 2008, and if Mr. Bin 'Attash decides not to join, then stand-by counsel will withdraw from this motion at the time.

² Counsel for Mr. Aziz Ali note that as of the filing of this document, Mr. Aziz Ali has indicated his willingness to be represented by military and civilian counsel. This was previously communicated to the Commission by e-mail dated 23 June 2008.

³ Counsel for Mr. Bin al Shibh incorporate by reference facts, arguments, and legal authority detailed in D-010, its Defense Motion for Special Relief, filed 13 June 2008, and believe the relief sought in D-010 to be in alignment with the proposed Trial Schedule in this motion.

- b. 25 July 2008: Deadline for government production of discovery to standby counsel;
- c. 13 August 2008: Hearing at GTMO for a determination of Mr. Bin al Shibh's competency;
- d. 3 September 2008: Deadline for accused to file motions related to *pro se* representation;
- e. 10 September 2008: Government responses to defense motions related to *pro se* representation;
- f. 17 September 2008: Hearing at GTMO on motions related to *pro se* representation;
- g. TBD⁴: Discovery Motions from all parties; such date should be no less than 6 to 9 months after initial production of discovery by the government;
- h. TBD: Hearing regarding discovery motions;
- i. TBD: Law Motions from all parties; and
- j. TBD: Hearing regarding law motions.

3. **Overview:** Prior to, and during, the initial session, defense counsel repeatedly requested the military judge delay advising the accused regarding their rights to counsel. In their written and verbal requests, counsel cited the numerous logistical obstacles which frustrated their ability to meet with the accused to build attorney-client relationships and to assemble competent defense teams.

The military judge denied these requests and advised the accused of their rights to counsel at the 5 June 2008 arraignment. All five accused expressed a desire to proceed *pro se*.⁵

⁴ The accused cannot propose a deadline for discovery motions until the Commission resolves logistical issues related to *pro se* representation. Further, neither the accused nor standby counsel have any indication of the nature and amount of discovery the government will provide. Any deadline proposed by the accused must be reassessed once the issues of resources and the scope of discovery are determined.

Since the arraignment, counsel have had a limited opportunity to consult with the accused regarding the nature and scope of their roles as standby counsel and civilian consultants, and, consequently, to assist the accused in developing a pretrial motions strategy. In the course of these meetings, several of the accuseds have agreed to future meetings with counsel and directed counsel to engage in certain tasks consistent with presumptive responsibilities of stand-by counsel, including seeking an extension of time to file motions to permit the Commission and counsel to address the following issues: 1) the obstacles which persist in denying standby military counsel and civilian consultants from meeting with the accused to provide assistance; 2) the resources required to effectuate the accused right to proceed *pro se*; 3) the procedures required for providing the accuseds meaningful access to discovery in order to allow them to prepare their defense; 4) the need for additional time to allow the accuseds a meaningful opportunity to review discovery in order to identify and draft appropriate discovery, law and evidentiary motions; and 5) the obligation of standby counsel to be prepared to step in at any stage of the proceedings and provide effective assistance of counsel.

The pre-trial litigation schedule proposed by the accuseds presents a reasonable time frame to resolve the host of complex issues raised by each accused's desire to proceed with self-representation.

4. **Burden and Standard of Proof:** Section 949e of the Military Commissions Act provides that the "military judge . . . may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just." As the moving party, the defense bears the burden of proof on any question of fact and the burden of persuasion by a showing of a preponderance of evidence. *See* R.M.C. 905(c).

⁵ The military judge refused to accept Mr(s). Bin al Shibh and Al Hawsawi's requests to proceed *pro se* based on concerns regarding competency and coercion, respectively.

5. **Facts:**

- a. On 9 May 2008, the charges were referred capital for trial by military commission. On 14 May 2008, the Military Judge was detailed and provided initial notice to the parties that the arraignment was scheduled on 5 June 2008 at GTMO.
- b. Between 16 and 19 May 2008, detailed military counsel for all five accused sought a continuance of the arraignment. Detailed defense counsel argued: that restrictions on travel and client availability greatly hindered the defense's ability to form attorney client relationships prior to the scheduled arraignment date; that competent defense teams were not yet formed; and that the defense lacked adequate facilities, resources, and security clearances to perform its duties adequately. The Motion was denied on 22 May 2008, as the Commission found that "the fact that all defense counsel are not yet fully integrated into the litigation process is not a valid basis in support of the continuance request" and that "progress is being made with regard to dealing with logistical challenges associated with this case." [Commission Ruling, D-002-006, page 2]
- c. On 4 June 2008, the Military Judge conducted an 802 conference at GTMO, counsel for the accused renewed their objection to requiring the accused to elect counsel. The Military Judge refused to change course stating that he intended to "take a run at it" as it was the accused's right to exercise or not exercise. The Military Judge then expressed "if they won't play along, the detailed lawyer will be the guy." The Military Judge also discussed the proposed trial schedule with the parties. He explained the need to work within R.M.C. 707's 120-day trial clock; noting that the rule "was in the book." He queried: "Does that mean there's a real expectation that this case will go to trial within 120 days? Probably, not." The Military Judge then reassured counsel "you will have a reasonable opportunity to prepare for trial."
- d. On 5 June 2008, the accused were arraigned. Khalid Sheikh Mohammed waived his right to counsel and elected to represent himself. Detailed military counsel were assigned as standby counsel and civilian counsel were permitted to remain as consultants.
- e. Mr. Bin Attash also rejected representation by counsel; however, he requested that civilian counsel be permitted to stay to assist him. During the Military Judge's inquiry regarding self-representation, Mr. Bin Attash indicated that he had not read the Rules for Trial Before Military Commissions because he was refused a translated copy.
- f. Mr. Bin al Shibh also attempted to waive counsel. The Military Judge declined to accept his waiver based on representations by counsel and security personnel that Mr. Bin al Shibh was taking [REDACTED] medication.
- g. Mr. Aziz Ali described his military counsel as "decorations" citing his inability to meet with them before the arraignment. Mr. Aziz Ali elected self-representation after consulting with detailed counsel regarding his election for five minutes prior to the afternoon session. During the inquiry, he indicated a willingness to meet with two civilian counsel, [REDACTED] and [REDACTED]. Contrary to the representations made to military counsel for Mr. Aziz Ali, [REDACTED] security clearance was not completed prior to the arraignment. As a result, Mr. Aziz Ali continues to be denied the opportunity to meet with civilian counsel.
- h. Counsel for Mr. Al Hawsawi objected to the Military Judge's consideration of his client's

waiver of counsel. Detailed counsel argued that the co-accused had intimidated Mr. Al Hawsawi. Given the atmosphere of intimidation and coercion, counsel moved for a delay to consult with his client to determine whether to request severance. The Military Judge declined to accept Mr. Al Hawsawi's waiver of counsel, allowing counsel to brief the issue and present argument on 10 July 2008.

- i. As they each stated in response to questions from the Military Judge, none of the accused has any legal training or experience in a Westernized legal system.
- j. Three of the five accused required the use of a translator throughout the proceedings. Four of the five translators provided to assist the defense are non-native speakers. During their colloquies with the Military Judge, several of the accuseds noted that they were having difficulty communicating with their non-native translators. These are the same translators that the defense has been forced to rely upon for communications during client meetings. Additionally, on several occasions during the arraignment proceedings, the accuseds expressed frustration with the court interpreters' translations and attempted to object personally and through counsel.
- k. On 9 June 2008, the Military Judge issued its Schedule for Trial and Order establishing motions filing deadlines and hearing dates for pre-trial motions. The Trial Schedule requires the defense file law and discovery motions by 11 July 2008 to be heard on 28 July 2008. Seven days later, on 18 July 2008, counsel are to file evidentiary motions to be heard on 11 August 2008.
- l. The week of 16 June marked the first post-arraignment opportunity for standby and civilian counsel to meet with the accused. The Joint Task Force (JTF) schedules and monitors counsels' visitation with the accused. JTF's unwritten policy allows for two visitation slots; one in the morning and one in the afternoon. JTF allows only two teams to meet with their clients per visitation slot. Consequently, three teams travelled to GTMO the week of 16 June. Counsel for Mr. Al Hawsawi and Aziz Ali spent five days at GTMO for the opportunity to meet with their clients for roughly seven hours. Civilian and military stand-by counsel for Mr. Khalid Sheikh Mohammed were able to meet with their client for a somewhat longer period, approximately 12 hours. Counsel for Mr. Bin al Shibh and, standby counsel and civilian counsel, for Mr. Bin Attash elected not to travel the week of 16 June given the limitations on their visitations. These two teams elected travel the following week and will be subject to the same limitations regarding the visitation schedule.
- m. During the week of 16 June 2008, hearings were conducted in two other military commissions (*U.S. v. Khadr* and *U.S. v. Jawad*). Consequently, the travel schedule was atypically efficient. At other times, travel to GTMO is complicated and unpredictable. Counsel may elect to take the "Commissions" flight a six passenger aircraft which leaves from Virginia on Tuesday (previously on Wednesday) for an approximately six hour flight to GTMO and returns on Thursday; allowing for up to three visitation slots depending on the timing of the flight and the number of teams on the island. Defense counsel must compete with prosecutors and other Commissions' personnel for these seats. This travel option is not available for civilian counsel, however. Alternatively, defense counsel (civilian or military) can travel on "rotator" flights which require presence on board GTMO for four days and returning on Saturday. Whereas this option provides the maximum ability to meet with the accused, counsel's ability to perform other defense functions are decreased due to the primitive nature of facilities on board GTMO.

n. The assistance that counsel can provide the accused while at GTMO is limited by the lack of working space and the Convening Authority's policies regarding housing. Civilian counsel cannot access computers without military counsel present because computers are accessible to DOD users through their military identification cards (CAC cards). The Convening Authority prohibits civilian counsel from staying in the military guest housing available on GTMO; this lodging has internet access which would allow counsel to conduct research in the absence of military counsel. Further, civilian counsel are precluded from meeting with the accused without military counsel; making it difficult to build trust with the client or to allow counsel to divide and conquer legal work while at GTMO. Military counsel do have access to computers at GTMO, but not documents stored on system hard-drives accessible from the D.C. area facilities. Similarly, documents stored on the system hard-drives located at GTMO are not directly accessible from the D.C. area system. The issues associated with the several systems are aggravated by the fact that computer connectivity as well as e-mail access at GTMO is uncertain, at best.

o. Counsel continue to lack adequate facilities for the storage and discussion of classified materials outside of GTMO. On 13 June 2008, the defense counsel learned that employees of the Pentagon Force Protection Agency determined there was a problem with the SCIF in its Rosslyn office. The defense counsel have been ordered not to use the SCIF, the only one available for their exclusive use, until further notified because the SCIF's certification is now in question due to technical concerns. The final certification must be done by government agencies, other than the Office of the Chief Defense Counsel. The result is that, at present, the defense *still* lacks any properly certified facility in the Washington, D.C. area (the location of the primary defense offices), designated for its exclusive use. [REDACTED] classified a [REDACTED]

p. On 4 June 2008, the government provided the defense with approximately 7,500 pages of discovery; the partial contents of the materials reviewed by the Convening Authority. The majority of these documents are death certificates; leaving approximately 1,200 pages of unclassified discovery. At present, the government has not provided the classified portions of the referral documents to the accused, counsel or standby counsel, nor has the government responded in any way to numerous limited defense requests for discovery.⁶ A limited number of documents (the charge sheet and the trial schedule) have been provided to the accused in Arabic.

q. Paragraph 13 of Protective Order #3 prohibits counsel from disclosing classified information to the accused.

6. Law and Argument:

The military judge shall grant a continuance only upon findings that the interests of justice served by the continuance outweigh the best interests of the both the public and the

⁶ Counsel for Khalid Sheikh Mohammed and Ali Abdul Aziz Ali filed pre-referral requests for discovery of mitigation evidence. On 15 May 2008 Counsel for the co-defendants filed a joint request for discovery related to D 001, Defense Motion to Dismiss Based on Unlawful Influence. On 10 June 2008, counsel for Mr. Bin al Shibh requested discovery relevant to the competency determination.

accused in a prompt trial of the accused. *See* R.M.C. 707(b)(4)(E)(i). A trial court's ruling on whether to grant a continuance is reviewed for abuse of discretion. *See United States v. Wiest*, 59 M.J. 276, 279 (C.A.A.F. 2004), *citing United States v. Weisbeck*, 50 M.J. 461, 464-66 (C.A.A.F. 1999). The specific context of this, a complex capital case in which the accused have elected self representation, must weigh heavy in the Commission's analysis.

"Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 304-305 (1976). The Supreme Court has oft recognized that this need for reliability requires heightened procedural protections. *See, Gardner v. Florida*, 430 U.S. 349 (1977) (striking down a procedure that permitted the court to consider confidential information at capital sentencing); *Simmons v. South Carolina*, 512 U.S. 154 (1994) (holding that jurors must be informed that life sentence means life without parole); *Morgan v. Illinois*, 504 U.S. 719 (1992) (requiring court to elicit potential jurors views on capital punishment) and *Lockett v. Ohio*, 438 U.S. 586 (1978) (holding jurors must be permitted to consider evidence in mitigation).

In light of the Supreme Court's recent decision in *Boumediene v. Bush*, this Court cannot turn a deaf ear to the Supreme Court's death penalty jurisprudence, which requires heightened procedural protections. In *Boumediene*, the Supreme Court rejected the government's argument that constitutional protections, specifically the right to habeas corpus, did not apply to detainees based on their status (designation by the Executive enemy combatants) and location (outside U.S. sovereignty). The Court expressed grave concern regarding the political branches attempts through the Military Commissions Act and Executive Orders to execute an end run around the

protections afforded by the Constitution:

The Constitution grants Congress and the President the power to acquire, dispose of and govern territory, not the power to decide where and when its terms apply. Even when the United States acts outside its borders, its powers are not “absolute and unlimited” but are subject to such restrictions as are expressed in the Constitution.” *Murphy v. Ramsey*, 114 U.S. 15, 44 (1855). Abstaining from questions of sovereignty is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another.

533 U.S. ____ (2008).

In reaching its decision regarding the application of habeas, the Court set the framework for applying the Constitution in trials before Military Commission. In seeking relief, consistent with this opinion, the accused rely on the statutory provisions of the Military Commissions Act as well as the rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Both factually and legally, this is the most complex mutli-defendant cases in the history of American jurisprudence. In its request for Protective Order Number 3, the government characterized its six-year investigation as “the largest criminal investigation in the history of the United States,” noting that it required coordination between the FBI, civil and state authorities, other federal agencies and foreign governmental agencies. The legal challenges are equally immense and complex. The accused are defending themselves without a fundamental understanding of Western legal culture, without resources, without access to discovery in a military commissions system whose procedures rest on tenuous legal ground in light of *Boumediene*. They are in no position to intelligently and competently meet the Commission’s deadline for the submission of discovery and law motions.

I. GRANTING AN ENLARGEMENT OF TIME MITIGATES THE IMPACT OF THE OBSTACLES LIMITING ACCESS TO THE ACCUSED AND ALLOWS ACCUSED THE BENEFIT OF STANDBY COUNSELS’ ASSISTANCE.

At the arraignment, each accused expressed his desire to represent himself at future proceedings. In response, the Commission appointed standby counsel for three of the five accused and permitted counsel to represent the remaining accused pending the resolution of issues involving their elections of counsel. During the arraignment, and in its prior written decision denying the defense request for a continuance, the Military Judge noted that elections, to include the selection of counsel, may change as the proceedings progress. Further, to protect the accuseds and the fairness of the proceedings, the Military Judge designated detailed military counsel as stand by counsel and permitted civilian counsel to act as consultants.

The accuseds and counsel understand the obligations of standby counsel and civilian consultants as two-fold: 1) to assist the accused with self-representation by advising them on the law and procedure relevant to this case; and 2) to prepare the case should the Commission prohibit the accused from proceeding *pro se* under R.M.C. 506. Standby counsel and civilian consultants must act consistently with their state rules of professional responsibility, which in all cases require that any representation undertaken must be competent. In determining competency, counsel rely on the American Bar Association's Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (revised 2003), which "establish a national standard of practice for the defense of capital cases." Guideline 1.1. Given the posture of this case, three Guidelines are relevant to the continuance analysis: Guideline 10.5—"Relationship with the Client;" Guideline 10.7—"Investigation;" and Guideline 10.8—"The Duty to Assert Legal Claims."⁷

Guideline 10.5 advises that "counsel should make every appropriate effort to establish a relationship of trust with the client, and should maintain close contact with the client." Trust can

⁷ The full text of the Guidelines and their commentary is available at <http://www.abanet.org/deathpenalty/resources>.

only be established through frequent and meaningful contact. Unlike a typical criminal case, the accused effectively cannot write to counsel [REDACTED] and there is no possibility for phone communication for the same reason. Consequently, counsel and the accused are left with one option, personal meetings. Counsels' attempts at scheduling such meetings are frequently frustrated by the difficulties associated with travel to GTMO and JTF rules which limit visitations.

Guideline 10.7 unequivocally states that counsel must conduct a thorough and independent investigation relating to both guilt and punishment, regardless of any statement by the client that such evidence is not to be collected or presented. This Guideline's commentary provides a nonexhaustive description of the elements of a competent investigation. In the current posture of this case, standby counsel are required to assist the accused in understanding these potential sources of investigation. Further, standby counsel and civilian consultants must proceed assuming there is a possibility that they will be called upon to represent the accused. Counsel cannot ethically step in and provide representation absent appropriate pre-trial preparation, which includes conducting a comprehensive investigation consistent with Guidelines.

Finally, under Guideline 10.8 counsel have a responsibility to consider, investigate and evaluate all potential legal claims and when appropriate file motions in support of those claims. The commentary to the Guideline admonishes counsel to vigilantly develop and protect the trial record to preserve issues for appeal.

Counsels' ability to comply with the ABA Guidelines or to even provide the most basic assistance in support of *pro se* representation is frustrated by the lack of resources and logistical complications catalogued both in the statement of facts and counsels' verbal and written requests to the Military Judge for continuance of the initial session. On behalf of the accused, counsel

request the Military Judge reconsider his motions schedule to account for the significant difficulties counsel face in communicating with the accused.

On behalf of the accused, counsel have proposed deadlines for its next logical set of motions in preparation for the receipt of discovery from the government. The Military Judge, as he has suggested, has the ability to grant relief extending R.M.C.'s 120-day clock. In reaching scheduling decisions, the accused request the Military Judge consider other federal cases as a benchmark. The Federal Death Penalty Resource Counsel Project collects and analyzes statistics relevant to death penalty litigation in federal courts. As director of the program [REDACTED] is familiar with these statistics. Attached hereto is a copy of an Affidavit signed by [REDACTED] in November 2007 that provides that the average time from indictment to trial in a federal capital case is approximately 20.5 months.

The case of *U.S. v. Zacarias Moussaoui* is perhaps more instructive as it involved legal issues similar to those presented here including, the use of classified material, charges involving the same complex conspiracy, and *pro se* representation. The time from indictment to trial in that case was approximately five years; one year of elapsed between the initial indictment and the Attorney General's decision to authorize the death penalty.⁸

The enlargement of time requested by the accused is reasonable in light of the logistical challenges presented. The additional time will permit standby counsel to assist the accused in proceeding *pro se* while ensuring it is prepared to engage in competent representation.

II. THE CURRENT MOTIONS SCHEDULE DENIES BOTH THE ACCUSED AND STANDBY COUNSEL ADEQUATE OPPORTUNITY TO REVIEW DISCOVERY AND IDENTIFY MOTIONS.

As a threshold matter, the Commission must determine the parameters of the accused's

⁸ The timeframe was calculated from the docket available on the Eastern District of Virginia's website at <http://www.vaed.uscourts.gov/notablecases/index.html>.

statutory and constitutional rights to self-representation. See R.M.C. 506; *Faretta v. California*, 422 U.S. 806 (1975) and *McKaskle v. Wiggins*, 465 U.S. 168 (1984). Pretrial litigation is necessary to determine how this Commission, the accused and counsel will proceed. The two immediate issues which must be resolved are whether the government will provide resources consistent with the accused's rights of access to the courts and to present a defense and whether and, to what extent, the accused will be provided access to classified and unclassified discovery.

The right to prepare a personal defense as set out in *Farretta* is meaningless without providing the accused some basic legal resources. The constitutional right of meaningful access to the courts mandates that government provide prisoners with adequate law libraries or adequate assistance from persons trained in the law. *Bounds v. Smith*, 430 U.S. 817 (1977). This guarantee is recognized for pre- and post-trial inmates in state, federal and military facilities through the use of an institutional library or access to legal materials via computer. At this stage in the litigation, the accused lack the most basic tools necessary to defend themselves such as adequate translators who can assist in explaining complicated legal concepts or an Arabic copy of the Rules for Military Commissions, which they can consult and study. The accused's request for additional time reflects their intention to file motions seeking resources and access to legal materials so that they may file motions in the future.

The provision of discovery presents another thorny preliminary matter which the accused must address through requests for relief prior to filing motions. Prior to the *pro se* election, the defense discovery requests have been met with silence by the government. Although the government represented that it intended to provide counsel with the referral binder (the documents considered by the Convening Authority), it has not turned those materials over. As a result, prior to the self-representation election, counsel were denied the materials necessary to file even preliminary motions such as motions challenging the referral process. The

government's reluctance to provide *defense counsel* with discovery signals the likelihood that the accused will be denied access to materials. As it currently stands, counsel are prohibited from sharing classified information with accused regardless of whether such evidence is exculpatory in contravention of *Brady v. Maryland*, 373 U.S. 83 (1963).

The several accuseds intend to request that they be provided a copy of both classified and unclassified discovery. Currently, there are no procedures in place to facilitate such a request. It is necessary for the accused, if not standby counsel at the very least, to have adequate opportunity to review the discovery materials before they can consult with, and advise, the accused regarding the preparation of the appropriate motions. The accused cannot make an informed request for a specific motions deadline date, at this time. However, stand by counsel estimate that it would not be practicable to file discovery and law motions in less than six to nine months after receipt of initial discovery from the government. This estimate attempts to account for the need for counsel to overcome significant cultural and educational barriers, to review a voluminous amount of discovery, to identify and advise the accused of potential motions, and to assist the accused in drafting complex legal pleadings, however, the accuseds may require additional time beyond this initial estimate.

III. THE GOVERNMENT SUFFERS NO PREJUDICE FROM AN ENLARGEMENT OF TIME; HOWEVER, THE ACCUSED WILL SUFFER GRAVE PREJUDICE IF THE REQUEST IS DENIED.

No prejudice to the government will result from the enlargement of time as requested herein. Over the past six years, the government has undertaken a multinational criminal investigation in order to perfect its case against the accused. During much of that period the several accuseds have been incarcerated. The timing of the referral of charges was set by the convenience to the government, not by legal necessity. The

government cannot now claim that some late discovered concern for speedy trial will be prejudiced by granting the requested relief.

In order to proceed to trial and allow its case to be tested in the adversarial system, the government must provide the accuseds with discovery so that they may assess the government's evidence and conduct their own investigation and prepare their defense. Without an enlargement of time, the trial schedule will roll on to trial without allowing adequate opportunity for the accused to view discovery and file the significant number of motions in this complicated capital case. Such a result would benefit neither the adversarial process nor the administration of justice.


7. **Request for Oral Argument:** The defense does not request oral argument, unless there is a dispute as to any material fact necessary for resolution of the issue. If such a dispute were to arise, the defense reserves the right to request production of witnesses and to request oral argument.

8. **Conference with Opposing Counsel:** The defense conferred with the Prosecution regarding its requested relief. The prosecution opposes this motion.

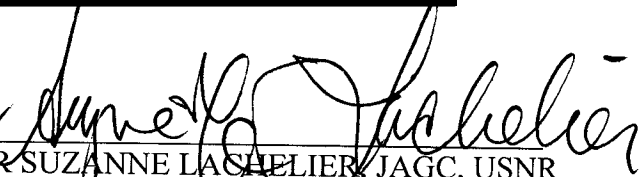

9. **Attachments:**

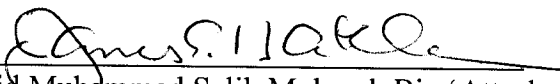

A. Affidavit of [REDACTED] dated 14 November 2007

Respectfully submitted,

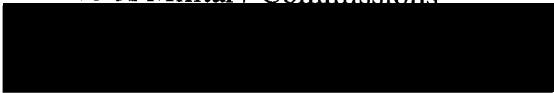
By: 
CAPT PRESCOTT L. PRINCE, JAGC, USNR
LTC MICHAEL ACUFF, JA, USA
As Standby Counsel, filing at the request of the accused

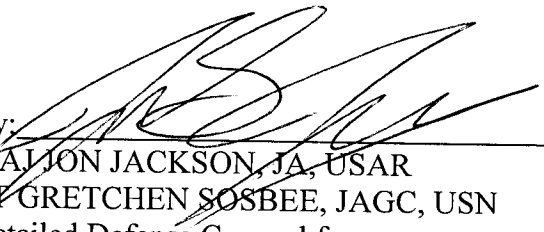
Office of the Chief Defense Counsel
Office of Military Commissions



By: 
CDR SUZANNE LACHELIER, JAGC, USNR
LT RICHARD E.N. FEDERICO, JAGC, USN
Detailed Defense Counsels for Ramzi bin al Shibh
Office of the Chief Defense Counsel
Office of Military Commissions


By: 
Walid Muhammad Salih Mubarak Bin 'Attach,
pro se
As Standby Counsel, filing at the request of the accused
LCDR JAMES HATCHER, JAGC, USNR
CPT CHRISTINA JIMINEZ, JA, USAR
Office of the Chief Defense Counsel
Office of Military Commissions


By: S
LCDR BRIAN MIZER, JAGC, USN
MAJ AMY FITZGIBBONS, JA, USAR
Detailed Defense Counsel for
Ali Abdul Aziz Ali
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By: 
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LT GRETCHEN SOSBEE, JAGC, USN
Detailed Defense Counsel for
Mustafa Ahmed Adam al Hawsawi
Office of the Chief Defense Counsel
Office of Military Commissions



DECLARATION OF [REDACTED]

1. I currently serve as the Director of the Federal Death Penalty Resource Counsel Project. This Project assists court-appointed and defender attorneys charged with the defense of capital cases in the federal courts throughout the United States. Declarant has served as Resource Counsel since the inception of the Resource Counsel Project in January, 1992. The Project is funded and administered under the Criminal Justice Act by the Office of Defender Services of the Administrative Office of the United States Courts.

2. My responsibilities as Director of the Federal Death Penalty Resource Counsel Project include, among other duties, the monitoring of all federal capital prosecutions throughout the United States in order to collect information regarding district court practices in federal capital trials.¹

3. In order to carry out the duties entrusted to us, the Resource Counsel Project maintains a comprehensive list of federal death penalty prosecutions and detailed information regarding district court practices in these cases. We accomplish this by reviewing dockets and by downloading and obtaining indictments, pleadings of substance (including sealed documents), notices of intent to seek or not seek the death penalty, and by telephonic or in-person interviews with experts, defense counsel and/or consultation with chambers. This information is regularly updated, and is checked for accuracy whenever possible against any available United States government information regarding federal capital prosecutions. The Project's information regarding practices in federal capital

¹The work of the Federal Death Penalty Resource Counsel Project is described in the report prepared by the Subcommittee on Federal Death Penalty Cases, Committee on Defender Services, Judicial Conference of the United States, FEDERAL DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION (May, 1998), at 28-30. The Subcommittee report "urges the judiciary and counsel to maximize the benefits of the Federal Death Penalty Resource Counsel Project ..., which has become essential to the delivery of high quality, cost-effective representation in death penalty cases ..." *Id.* at 50. <http://www.uscourts.gov/dpenalty/1COVER.htm>.

prosecutions has been relied upon by the Administrative Office of the United States Courts, by the Federal Judicial Center and by various federal district courts.

4. Resource counsel collect comprehensive, accurate data concerning various practices that have emerged since the federal courts resumed trying capital cases in 1990. This collection of data includes the intervals of time between various pretrial milestones and trial. The federal courts have, with few exceptions, permitted considerable time between the indictment and mitigation submission and between the government's notice of intent to seek the death penalty and the commencement of trial.

5. The average time between indictment and trial in federal capital cases is approximately 20.5 months. The average time between indictment and notice of intent to seek the death penalty is 12.5 months. The average time between notice of intent to seek the death penalty and trial is approximately 12.6 months.²

6. Pursuant to declarant's responsibilities as Federal Death Penalty Resource Counsel, declarant has compiled the above information regarding federal capital cases in the regular course of the business of the Federal Death Penalty Resource Counsel Project.

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 14th day of November, 2007.



²The Project has obtained the date for 367 indictments, 417 notices of intent to seek the death penalty and 410 trials. This accounts for the apparent disparity in the figures above.

UNITED STATES OF AMERICA

v.

**KHALID SHEIKH MOHAMMED;
WALID MUHAMMAD SALIH MUBARAK
BIN 'ATTASH;
RAMZI BINALSHIBH;
ALI ABDUL AZIZ ALI;
MUSTAFA AHMED AL HAWSAWI**

D-010

Government Response

to the

Defense Motion for Special Relief for an
Enlargement of Time to File and Continuance

23 JUNE 2008

1. **Timeliness:** This response is filed within the time allowable by the Military Commissions Trial Judiciary Rules of Court.
2. **Relief Sought:** The Government respectfully requests the Military Judge deny the Defense Motion for Special Relief for an Enlargement of Time to File and a Continuance.
3. **Overview:** The Prosecution will soon provide to the Defense the medical records of the accused, from the time of his capture in September 2002 until the present,¹ that are currently known to the Prosecution. These records constitute the required discovery on the issue of whether the accused knowingly and voluntarily waived his right to counsel when he elected to represent himself. The Prosecution takes no position on the issue of whether the accused is competent to represent himself, but notes that the defense will soon have sufficient information to determine if it wants to raise an issue regarding the accused's competency under R.M.C. 909. While the Prosecution does not oppose a reasonable extension of time² for the Defense to file a motion on the issue of the accused's competency, the Prosecution does oppose the Defense's requested enlargement dates, and a reasonable amount of time to file such a motion should not require a continuance of the 10 July session to ask for such relief. Any impact that the *Boumediene* or *Edwards* cases may have on the accused's rights can be litigated per the schedule set forth for law motions.

¹ The Prosecution has requested that JTF-GTMO provide a complete copy of Mr. Bin al Shibh's medical records. JTF-GTMO has prepared those records for release and the Prosecution is currently arranging to have those records transported from GTMO and served on the Defense. Additionally, the Prosecution has been informed by JTF-GTMO that its policy regarding psychiatric and psychological records is to require a court-order prior to releasing those records it has determined may fall under certain privileges. The Prosecution will seek such an order from the Military Judge in the immediate future under a separate filing.

² Prosecution notes that 13 June 2008 was the date the defense motion was originally due, and, while obviously D-010 is a motion for continuance of that date, the Prosecution is unaware of any other established due dates for the motion. To clarify, the Prosecution does not object to a due date that would still allow for the Prosecution's response in time for litigation of the issue on 10 July 2008.

4. **Burden of Proof:** As the moving party, the Defense bears the burden of persuasion. *See* Rule for Military Commissions (RMC) 905(c).

5. **Facts.**

a. On 10 June 2008, at 1155 hours, the Prosecution received a request for discovery for eleven wide-ranging categories of evidence, many of which had multiple sub-categories of requested items. The Defense requested that the Prosecution disclose all of the requested evidence by 1630 on 11 June 2008. The Defense posits that its discovery request is “narrowly tailored to seek information, documents, and materials relevant to the competency issue.” *See Defense Motion* fn 2.

b. The Prosecution responded, in writing, to the Defense request the afternoon of 23 June 2008, agreeing to disclose all medical records, known to the Prosecution, from the date the accused was captured to the present, to include the medications the accused was taking during the initial arraignment (5 June 2008). The Prosecution will turn over all the medical records in two different discovery releases: The first from the time the accused was sent to the custody of the Department of Defense in September of 2006 to present, and the second release constituting the medical records of the accused from the time of his capture until September of 2006. The second set of records described above will require a more thorough classification review and may take longer to disclose than the medical records from DoD.

c. In its response, the Prosecution denied discovery on those portions of the request it determined were not relevant or material to the preparation of the defense on the issue currently before the military commission. In general terms, the Prosecution denied any request involving documents on the “ill treatment” of other detainees, any allegations of mistreatment the accused has made, the identities of all people who have ever spoken to the accused (for any reason) since he has been represented by counsel, records relating to interrogation methods, and the name, contact information, and impeachment materials of any person involved in the detention and/or interrogation of the accused at Guantanamo Bay. For more specificity on the Defense request and the grounds under which the Prosecution denied each item of discovery, please see *Prosecution’s Response to Defense Request for Discovery of Records Pertaining to Ramzi Bin al Shibh* (Attachment A).

6. **Discussion³**

a. Manual for Military Commission Rule 701 governs discovery in the military commission system, and requires disclosing to the Defense information “material to the preparation of the defense or intended for use by the trial counsel.” The Discussion to Rule 701 cites to *United States v Yunis*, 867 F.2d. 617 (D.C. Cir 1989) for the definition of “material to the preparation of the defense.”

³ As directed by the Military Judge in [REDACTED] email dtd 16 June 2008, the Prosecution is addressing the issue of discovery brought up by the defense.

b. In *Yunis*, the D.C. Circuit determined that in order for information to be discoverable, the Defense must show that the requested information is both *relevant* and *material* to its case. *See id.* at 621-22. The first step in the *Yunis* inquiry is relevance. In *Yunis*, the D.C. Circuit defined relevant evidence as that which has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *Yunis*, 867 F.2d at 622 (quoting Fed. R. Evid. 401) (internal quotation marks omitted).

c. The accused has elected to represent himself in these proceedings. The Military Judge granted the detailed defense counsel the right to file a motion for unspecified relief, presumably related to the medication the accused is on, the reason for its administration, and whether either impacts his ability to represent himself in his commission case. At this point in time only documents relevant and material to the above specified issue are required to be disclosed. The Defense concedes as much, although obviously disagrees on what it believes is relevant to this specific issue. *See Defense Motion* fn 2. Therefore, the accused’s medical file more than satisfies any discovery obligation the Prosecution has under RMC 701 at this stage in the litigation.

d. There is simply no need to disclose all of the documents requested by the Defense that are unrelated (and therefore not relevant) to the issue presently before the military commission. The Military Judge must first make a determination on the issue of whether to grant the accused’s request to represent himself. If the Military Judge determines that he has enough information to determine that the accused voluntarily and knowingly waived his right to counsel, the unrelated discovery requested by the Defense can always be renewed by the accused himself, and would then be considered by the Prosecution in light of whether it is relevant to *any stage* of the trial (as opposed to the limited issue currently before the military commission). There is simply no basis for the proposition that the Defense is entitled to anything other than the medical records of the accused on the issue currently before the military commission.

e. The Prosecution’s denial of certain items at *this point in time* in no way precludes the Prosecution revisiting aspects of the request at a later point in time. The Prosecution’s position is due, in part, to the fact that the accused has elected to represent himself pro-se, and is presumed to be competent under the rules. *See R.M.C. 909(b)*. It is possible that the accused, if found competent to represent himself, would take an entirely different approach to pre-trial litigation. It is also important to note that the accused himself is aware of much of the information requested by the Defense, at least in regard to matters dealing specifically to him, and could provide that information to the detailed defense counsel.

f. The Prosecution takes no position on whether the accused can represent himself before this military commission. However, the only discovery relevant and

material at this time is the medication the accused is currently being treated with, as well as the medical records of the accused; which will soon be in the possession of the Defense.

g. The Defense claims that, “inexplicably,” despite being detailed to the case since early April 2008, the government has left the defense in the dark, without any access to any documents, materials, or information about the accused’s background, experience, and conduct, particularly while in the custody of the United States government. *See Defense brief pg 7 and 8.* In fact, if that were indeed the case, it would be readily explainable, as the Prosecution did not receive a request for such discovery until 10 June 2008. This is notwithstanding the fact that the detailed defense counsel had access to their *client*, who knows and could provide his own background, experience, and conduct over the last five years.

h. The Defense further goes on to claim that the Prosecution provided what it termed “minimal” discovery on 3 June 2008. (*See Defense Motion*, fn 2). The Prosecution’s discovery actually consisted of approximately 7,238 pages of evidence that had been provided to the Convening Authority for her consideration in making a decision on whether to refer the case to trial. The discovery included evidence that supports all of the charges on the charge sheet, to include each and every one of the 169 overt acts alleged, and law enforcement statements of each of the five accused, to include the detailed defense counsel’s client. This initial discovery included nearly everything the Convening Authority considered.⁵

i. Should the Defense in fact want to challenge the competency of the accused, there is a specific method by which they can do that under RMC 909. The medical records provided to the accused, in advance of the scheduled hearing, provides ample time for the Defense to request an R.M.C. 706 board should they choose to do so on the issue of competency. The Defense need not speak to every person involved in the detention or interrogation of the accused over the last five years in order to do so. While the Prosecution does not oppose a reasonable enlargement of time for the Defense to file a motion on the issue of the accused’s competency, there is no basis for a continuance of the 10 July 2008 hearing.

j. Notwithstanding the fact that the *Boumediene* case specifically limited its holding only to the provision in the Military Commissions Act denying enemy combatants access to the federal courts (“The only law we identify as unconstitutional is MCA §7, 28 U.S.C.A. §2241(e)(Supp.2007).”) *Boumediene v Bush* 553 U.S. ___, slip op. 66 (2008) , the Court’s decision and its impact (if any) on military commissions is not a ground for an enlargement of time or a continuance of the 10 July 2008 hearing date. The 10 July 2008 date is important to maintain so that the important decision on whether Mr. Bin al Shibh and Mr. Mustafa al Hawsawi may represent themselves is determined, so that litigation may proceed accordingly.

⁵ Excepting only those items that were classified due to the lack of a protective order in the case at that time. Those items are due to be delivered to the Defense on 24 June 2008.

k. Should defense counsel (or the accused acting *pro se*) decide to make a motion for appropriate relief based on the *Boumediene* decision, they (or he) will have ample opportunity to do so by the timeline set forth for litigation of law motions. The accused is not prejudiced in any way by not being granted an enlargement of time or a continuance of the 10 July hearing so that the Defense may analyze the impact of the decision. The same may be said for the Supreme Court's recent decision in *Indiana v. Edwards* and its applicability (if any) to the military commission system.

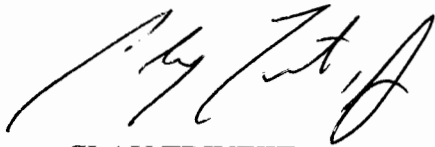
7. **Conclusion:** Although the Prosecution takes no position on whether the accused is competent to represent himself, the Defense will soon have the accused's medical records in the event they decided to put the accused's competency at issue. While the Prosecution does not oppose a reasonable extension of time for the Defense to file a motion on the issue of the accused's competency, the Defense should not require a continuance of the 10 July session to ask for such relief.

8. **Attachments**

- a. Prosecution Response to Defense Request for Records Pertaining to Ramzi Bin al Shibh

9. **Request for Oral Argument:** The Government does not request oral argument but reserves the right to respond to any oral argument the defense may make.

10. **Respectfully submitted,**



CLAY TRIVETT
Prosecutor
Office of Military Commissions



23 June 08

From: Clay Trivett, Office of the Chief Prosecutor, Office of Military Commissions
To: S.M. Lachelier, CDR, JAGC, USN, Detailed Defense Counsel
R.E.N. Federico, LT, JAGC, USN, Detailed Defense Counsel

Subj: PROSECUTION RESPONSE TO THE DEFENSE REQUEST FOR
DISCOVERY OF RECORDS PERTAINING TO RAMZI BIN AL SHIBH

Manual for Military Commission Rule 701 governs Discovery in the military commission system, and requires the disclosure to the defense of information material to the preparation of the defense or intended for use by the trial counsel. The Discussion Section to Rule 701 cites to *United States v Yunis*, 867 F.2d 617 (D.C. Cir 1989) for the definition of “material to the preparation of the defense.”

In *Yunis*, the D.C. Circuit determined that in order for information to be discoverable, the Defense must show that the requested information is both *relevant* and *material* to its case. *See id.* at 621-22. The first step in the *Yunis* inquiry is relevance. In *Yunis*, the D.C. Circuit defined relevant evidence as that which has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *Yunis*, 867 F.2d at 622 (quoting Fed. R. Evid. 401) (internal quotation marks omitted).

The accused has elected to represent himself in these proceedings. The Military Judge granted you, as detailed defense counsel, the right to file a motion for unspecified relief regarding the medication your client is currently taking and whether it impacts his ability to represent himself in his commission case prior to his decision on whether to grant the accused’s request to do so. It is the Prosecution’s position that, at this point in time, only documents relevant and material to the preparation of the defense regarding that specific issue are discoverable. Therefore, the Prosecution’s denial of certain items at this point in time does not necessarily indicate that the Prosecution would not revisit aspects of the request at a later point in time.

Prosecution Response to each item requested in your request

The Prosecution’s response to each of the items requested may be found below in bold and italics. (numbers correspond to the number in the original defense request)

1. All evidence in control of or known to the government concerning the physical and mental health of the accused. *See generally*, *United States v. Green*, 37 MJ. 88 (C.M.A. 1993). Material sought includes, but is not limited to, medical records reflecting psychiatric diagnosis or treatment or head injury of any type and drug and/or alcohol addiction diagnosis or rehabilitation records. *United States v. Brakefield*, 43 C.M.R. 828 (A.C.M.R 1971); *United States v. Brickey*, 8 M.J. 757 (A.C.M.R 1980) affirmed 16 M.J.

258 (C.M.A. 1983); United States v. Eschalomi, 23 M.J. 12 (C.M.A. 1985); R.M.C. 701(c)(2), 706.

The Prosecution will turn over all of the accused's medical records, known to the Prosecution, from the time of his capture until present. The Prosecution has also received, and will disclose to you, a summary of the medications that the accused is currently on, to include when he started the medications and whether he was on the medications at the arraignment (5 June 2008).

2. Any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, that are within the possession, custody, or control of the government at any level, the existence of which is known, or by the exercise of due diligence may become known, to the trial counsel, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case in chief at trial. R.M.C. 701(c)(2). This specifically includes, but is not limited to:

- a. Copies of the records of any and all medical screenings, physicals, examinations, mental health evaluations, as well as notes prepared by any treating physician, physician's assistant, medic, psychiatrist, psychologist, chaplain, counselor, or other person who has examined the mental or physical condition of the accused at any time since he entered the custody of the United States (whether or not that custody was transferred at some time), including, but not limited to, all files on the accused created or kept by any "Behavioral Sciences Team" involved with the accused.

The Prosecution will turn over all of the accused's medical records, known to the Prosecution, from the time of his capture until present. The Prosecution is not aware of any notes prepared that fit your description above.

- i. The defense does not authorize the government to review or examine any such reports, notes, or other documents as they may be covered by M.C.R.E. 503 or 513, by M.C.R.E. 302, or by common-law privileges and privacy interests with respect to medical treatment. The defense does, however, request that the government order any such material turned over to the defense and provide contact information for any person who obtained or created such reports or other material.

The Prosecution has been informed that JTF-GTMO will not release any records that it has determined may fall under M.C.R.E. 302, 503 or 513 (related to the mental health of the accused) absent a court-order. The Prosecution will request a court-order that these items be disclosed.

3. Any and all records containing information pertaining to Mr. Ramzi bin al Shibh's physical or mental condition. This request includes, but is not limited to, medical records held at Guantanamo Naval Base, as well as records in the possession of any (United States or other) government agency that had contact with Mr. Bin al Shibh since his detention or arrest on September 11, 2002.

The Prosecution will turn over all of the accused's medical records, known to the Prosecution, from the time of his capture until present.

4. The government has conceded that it is prescribing psychotropic medications to Mr. bin al Shibh. The defense requests production of the identity of the medications currently and previously prescribed to Mr. bin al Shibh, the dosage of all medications given to him, when the medications were each first prescribed and for how long. In addition, the defense requests production of the name and contact information of any and all physicians who have monitored, or are currently monitoring, Mr. bin al Shibh's condition. This request is not limited to any psychiatrists or psychologists, but includes a request for the name and contact information of all medical personnel who have monitored Mr. bin al Shibh.

The Prosecution has received, and will disclose to you, a summary of the medications that the accused is currently on, to include when he started the medications and whether he was on the medications at the arraignment on 5 June 2008. As to your request for the names and contact information for all medical personnel, that part of your request is denied at this time as not being relevant or material to the preparation of the defense on the issue before the military commission.

5. The name of every person who interrogated, questioned or met with the accused after he was represented by counsel, the date of any such interrogation, questioning or meeting, the results of such meeting, as well as all notes or reports generated therefrom. R.M.C. 701 (c), (e); M.C.R.E. 304.

The Prosecution is not aware of any person who interrogated or questioned your client, for a law enforcement or intelligence purpose, after you were detailed to the case. In regard to your request for any other person who may have met with the accused on an issue related to his care and custody, that request is denied as not being relevant or material to the preparation of the defense on the issue currently before the military commission.

6. All records relating to alleged, suspected, investigated, substantiated or actual incidents of ill treatment of prisoners held in or interrogated at Guantanamo Bay Naval Base and any other detention facility where the accused was held or interrogated since his capture, including but not limited to (R.M.C. 701 (c), (e); M.C.R.E. 304):

- a. Records relating to the treatment of the accused while in custody, including any and all medical treatment he has received to-date.

To the extent that this is a request for records relating to the accused's treatment, other than medical treatment, that part of the request is denied as being too vague and/or not relevant or material to the preparation of the defense on the issue currently before the military commission. In regard to any and all medical treatment he has received, the Prosecution is going to turn over all of the accused's medical records, known to the Prosecution, from the time of his capture until present.

- b. Records relating to any person who was ever accused of, investigated for, or charged with ill-treatment of a detainee at Guantanamo Bay Naval Base, and any other facility where the accused was held or interrogated.

This part of your request is denied at this time as not being relevant or material to the preparation of the defense on the issue before the military commission.

- c. Records relating to any prisoner at Guantanamo Bay Naval Base, and any other facility where the accused was held or interrogated, who made an allegation of ill treatment or who was otherwise involved in an investigation of ill-treatment at any time, including but not limited to Mr. Jawad, Mr. Al Qhatani, Mr. Manadel al-Jamadi other specific individuals known from media reports or other sources to have been abused at any facility where Mr. bin al Shibh was held or interrogated.

This part of your request is denied at this time as not being relevant or material to the preparation of the defense on the issue before the military commission.

7. All records relating to interrogation methods permitted or used at Guantanamo Bay Naval Base, including but not limited to (R.M.C. 701 (c), (e); M.C.R.E. 304):

- a. Records, logs, notes relating to interrogation methods applied on the accused;

This part of your request is denied at this time as not being relevant or material to the preparation of the defense on the issue before the military commission.

- b. Records, logs, notes relating to interrogation methods applied on Khalid Sheikh Mohammed, Abu Zubayda and Abd al-Rahim al-Nashiri;

This part of your request is denied at this time as not being relevant or material to the preparation of the defense on the issue before the military commission.

c. Policies, practices, guidelines, Standard Operating Procedures, Rules of Engagement or other guidance relating to interrogation methods permitted or used at Guantanamo Bay Naval Base and at any other facility where the accused has been held or interrogated.

This part of your request is denied at this time as not being relevant or material to the preparation of the defense on the issue before the military commission.

d. Copies of any and all video-taped forcible removal of the accused from any location.

This part of your request is denied at this time as not being relevant or material to the preparation of the defense on the issue before the military commission.

8. The name and contact information, as well as personnel records of, any person involved in the detention and/or interrogation of the accused at Guantanamo Bay Naval Base, or at any other facility where the accused was held or interrogated. R.M.C. 701 (c), (e); R.M.C. 703; M.C.R.E. 304.

This part of your request is denied at this time as not being relevant or material to the preparation of the defense on the issue before the military commission.

9. All documents or information regarding any mistreatment of the accused at the hands of U.S. or Allied Armed Forces, civilians or contractors of which the government is aware. For purposes of this discovery request, 'mistreatment' includes the use of any "special interrogation plan," "harsh interrogation techniques" or other methods of interrogation. This includes any recorded allegation of such mistreatment made by the accused, any witness to the mistreatment, or any non-governmental organization (e.g., the International Committee for the Red Cross) that purports to document allegations of mistreatment. M.C.R.E. 304, R.M.C. 701(e)

This part of your request is denied at this time as not being relevant or material to the preparation of the defense on the issue before the military commission.

10. All interrogation manuals, directives, instructions and other policy guidance issued by any agency involved in any aspect of the detention and interrogation of the accused or of any other witness in the case, including individuals whose statements the government provides to the defense through discovery. R.M.C. 701(b), (c), (e); M.C.R.E. 304.

This part of your request is denied at this time as not being relevant or material to the preparation of the defense on the issue before the military commission.

11. All evidence affecting the credibility of government witnesses, or that of individuals who examined or treated or interrogated Mr. bin al Shibh, including but not limited to:

- a. Prior civilian and court-martial conviction and all arrests or apprehension of any such persons. In complying with this discovery request, the defense requests the government check with the National Crime Information Center (NCIC), National Records Center (NRC), and all local military criminal investigatory organizations for each witness. *United States v. Jenkins*, 18 M.J. 583, 584-585 (A.C.M.R 1984); R.M.C. 701(c); M.C.R.E. 608,609

This part of your request is denied at this time as not being relevant or material to the preparation of the defense on the issue before the military commission.

- b. Records of nonjudicial punishment, or adverse administrative actions (pending and completed), whether filed in official files or local unit files including, but not limited to, discharge prior to expiration of term of service for any reason, relief for cause actions, letters or reprimand or admonition and negative counseling relating to adverse or disciplinary actions concerning any such persons. R.M.C. 701(c); M.C.R.E. 608

This part of your request is denied at this time as not being relevant or material to the preparation of the defense on the issue before the military commission.

- c. All investigations of any type or description, pending initiation, ongoing or recently completed, that pertain to alleged misconduct of any type or description committed by any such persons. *United States v. Stone*, 40 MJ. 420 (C.M.A. 1994); R.M.C. 701(c); M.C.R.E. 608

This part of your request is denied at this time as not being relevant or material to the preparation of the defense on the issue before the military commission.

- d. All evidence in control of or known to the government concerning the mental status of any such persons. *United States v. Green*, 37 MJ. 88 (C.M.A. 1993). Material sought includes, but is not limited to, medical records reflecting psychiatric diagnosis or treatment or head injury of any type and drug and/or alcohol addiction diagnosis or rehabilitation records. *United States v. Brakefield*, 43 C.M.R. 828 (A.C.M.R 1971); *United States v. Brickey*, 8 M.J. 757 (A.C.M.R 1980) affirmed 16 M.J. 258 (C.M.A. 1983); *United States v. Eschalomi*, 23 M.J. 12 (C.M.A 1985); R.M.C. 701(c)(2), 706

This part of your request is denied at this time as not being relevant or material to the preparation of the defense on the issue before the military commission.

e. A copy of the Official Military Personnel File (OMPF) of any such persons R.M.C.701 (c)(l).

This part of your request is denied at this time as not being relevant or material to the preparation of the defense on the issue before the military commission.

f. Copies of the official civilian personnel file of any such persons.
R.M.C.701(c), (e)

This part of your request is denied at this time as not being relevant or material to the preparation of the defense on the issue before the military commission.

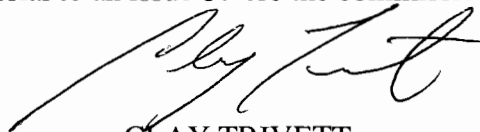
g. The results of any polygraph examinations, conducted on any such persons, including the Polygraph Examiner Report and related polygraph records, the Polygraph Consent Form, the Polygraph Examination Authorization Request, the Polygraph Examination Quality Control Review and any rights certificate executed by the examiner and the subject. *United States v. Mougenel*, 6 M.J. 589 (A.F.C.M.R 1978); *United States v. Simmons*, 38 M.J. 376 (C.M.A. 1993); R.M.C. 701 (c).

This part of your request is denied at this time as not being relevant or material to the preparation of the defense on the issue before the military commission.

h. The contents of all CITF accreditation files for all CITF investigators who have participated in investigations relating to this case, and similar such files for agents of any other government agency who have participated in investigations relating to this case. R.M.C.701(c), (e).

This part of your request is denied at this time as not being relevant or material to the preparation of the defense on the issue before the military commission.

Based on your representation that your request is narrowly tailored to seek information, documents, and materials relevant to the competency issue (See Defense Motion, Footnote 2), the Prosecution may reconsider its denials at such time that the requested discovery may be relevant and material to an issue before the commission.



CLAY TRIVETT
PROSECUTOR
OFFICE OF MILITARY COMMISSIONS

UNITED STATES OF AMERICA

v.

KHALID SHEIKH MOHAMMED, WALID
MUHAMMAD SALIH MUBARAK BIN
'ATTASH, RAMZI BIN AL SHIBH, ALI
ABDUL AZIZ ALI, MUSTAFA AHMED
ADAM AL HAWSAWI

D-011

Defense Reply
to Government Response to Defense Motion
for Special Relief for an Enlargement of Time
to File Motions

Ali Abdul Aziz Ali

1 July 2008

1. **Timeliness:** This Motion is timely filed within the period prescribed for reply under the Rules of Court. The Rules of Court require that a Reply be filed within three days of receipt of a Response. The Rules specifically exclude Saturdays and Sundays when the prescribed period is less than eleven days, as in the instant case.
2. The Government, in its Response to the Defense Request for an Enlargement of Time, fails to address the significant legal arguments raised by the *pro se* defendants and counsel. Rather, the Government relies on the unsupported assertion that the delay request is “patently unreasonable.” This assertion is particularly troubling given the Government’s initial approach to discovery¹ and its knowledge of the on-going logistical challenges faced by the defense. Instead of proposing solutions to these institutional obstacles, which must be resolved regardless of the accused’s status, the Government challenges counsels’ representations regarding the accused desire for delay. The defense respectfully requests the Commission disregard the Government’s attempt to obscure the issue of whether the defense request for delay is reasonable and serves the interests of justice, and grant the requested enlargement.

¹ Although the Government has provided limited discovery as noted in its response, the Government has provided these materials as individual TIF files which cannot be searched for text and must manually be opened one at a time. Further, the Government’s time frame in providing this initial discovery is instructive. The charges were referred on 9 May 2008. The referral materials were not provided (in any format) until 24 June 2008; more than six weeks after the referral. It defies logic to assume that the Government will provide the Defense with the more substantial discovery related to its case-in-chief in less than six weeks.

3. Beginning in paragraph two, the Government mischaracterizes the relief sought by the defense. The timeframe of six to nine months was provided as an estimate by the defense; dependent upon the Government's provision of discovery in a timely manner. Further, the defense proposed that discovery issues be resolved prior to the submission of law motions. Law motions are dependent on the development of factual support. Absent discovery, the defense is in no position to competently develop appropriate legal arguments. These considerations apply regardless of whether the accused proceed *pro se* or represented by counsel; standby counsel must be in a position to both advise the accused with respect to legal motions and to step in if necessary to try the case.

4. In a single paragraph entitled "Discussion," the Government takes issue with counsels' representations on behalf of the accused; questioning whether they have consented to the filing of the request for an enlargement. All counsel are aware of their ethical obligation of candor towards the tribunal. At the outset, the defense motion clearly delineates the positions of the respective accused. The Government has proffered no good faith basis for the Court to challenge counsels' representations regarding the accused's desires with respect to the request for an enlargement of time. With respect to Mr. Ali, counsel joined in the filing of the request for enlargement with his direction that they act *as his counsel*. If the Commission is inclined to reject counsels' representations, Mr. Ali must be permitted to join as a *pro se* defendant as counsel were acting at his specific direction when they joined in the request for enlargement.

5. In paragraph three, the Government asserts that the defense is "seeking to revisit issues already resolved at an earlier session." In the same paragraph, with respect to Mr. Ali, the Government asserts, "they (referring to counsel) cannot unilaterally make a declaration in an email that purports to *reverse the judge's findings regarding self-representation status*." The

Government appears² to be taking the position, uninformed by any legal authority, that the accused are precluded from exercising their statutory and constitutional rights to counsel, in light of their elections at the arraignment. This represents a misunderstanding of the Commission's findings as well as the governing law. *See, McKaskle v. Wiggins*, 465 U.S. 168, 183 (1984) (*pro se* defendant may agree to substantial participation by standby counsel); and *United States v. Beatty*, 25 M.J. 311, 316 (C.M.A. 1987) (recognizing that counsel, absent objection from the accused, could regain role as lead counsel). On 5 June, the Commission found that three of the accused wished to waive their right to counsel *on that date*. The Commission did not intend for these findings to place the accused in legal straightjackets with respect to counsel.

6. The Military Commissions Act is silent regarding the parameters of the role of standby counsel and there is no biding Commission precedent on the issue. In *McKaskle v. Wiggins*, 465 U.S. 168 (1984), the Supreme Court reconciles the right to self-representation with the existence of standby counsel. In light of *Boumediene*, Mr. Ali relies on both the Sixth Amendment and the statutory provision regarding standby counsel. The Supreme Court set two limits on the involvement of standby counsel: "First, the *pro se* defendant is entitled to preserve actual control over the case he chooses to present to the jury. . . . Second, participation by standby counsel without the defendant's consent should not be allowed to destroy the jury's perception that the defendant is representing himself." *Id.* at 178. Outside the presence of the jury, standby counsel is allowed unsolicited participation and may "address the court freely on his own behalf" so long as any disagreement between counsel and the defendant are resolved in the defendant's favor. *Id.* at 177. The trial judge need only be capable "of differentiating the claims presented by a *pro se* defendant from those presented by standby counsel." *Id.* at 179.

² The Government's response further confuses the issue when it states, "that counsel should continue to encourage the accused to accept attorney representation" but rejects the defense request for enlargement as a disingenuous attempt to "cultivate a relationship."

7. The Supreme Court recognized that the defendant has the ability to unilaterally change the role of counsel: “Once a *pro se* defendant invites or agrees to any substantial participation by counsel, subsequent appearances by counsel *must be presumed to be with the defendant’s acquiescence*, at least until the defendant expressly and unambiguously renews his request that counsel be silenced.” *Id.* at 183. At this early stage in the litigation, Mr. Ali may allow counsel to file motions on his behalf, as his counsel. He may subsequently reject counsels’ assistance and proceed *pro se*. This does not constitute a “disruptive brand of hybrid representation,” but rather, an equivocation born out of years of incommunicado detention, likely maltreatment, and insufficient time with counsel. As we are required, counsel intend to follow Mr. Ali’s directives as they are understood regarding the role of counsel. In either capacity, counsel may make requests of the Commission on behalf of Mr. Ali.

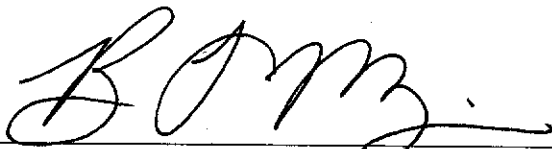
8. The Government has no standing to request the Commission inquire as to Mr. Ali’s desires with respect to counsel. The election of counsel or self-representation is both a statutory and constitutional right that belongs to Mr. Ali. *See, Faretta v. California*, 422 U.S. 806 (1975) and R.M.C. 506(c). The Commission must deny the Government’s request to re-open Mr. Ali’s colloquy based on counsel’s e-mail. The e-mail was intended to notify the Commission that counsel did, in fact, have permission to act as counsel in drafting and requesting an enlargement of time. In the absence of a finding of disruption or lack of decorum, it is Mr. Ali who determines how he wishes to proceed and the Government should be precluded from attempting to manipulate his election by requesting the Commission “clarify” the status of counsel.

9. Similarly, the Government’s request that the accused be polled regarding the Unlawful Influence Motion should be denied as it is a transparent effort to avoid complying with the Joint Defense Request for Discovery Relating to Unlawful Influence, which was filed three weeks before the arraignment. Counsel for Mr. Ali and Bin al Shihb have clearly communicated to the

Government that they intend to go forward with the Motion. The Motion has not been withdrawn and the Government is not entitled to poll the accused periodically in the hopes that they will change their minds.

10. The Government has not answered the fundamental issue now before the Commission; whether in light of the factual and legal complexity of this capital case the interests of justice are served by allowing the *pro se* accused and counsel a meaningful opportunity to review discovery, conduct an investigation, prepare pretrial motions and ultimately, a defense. The defense respectfully requests the Commission answer this question affirmatively, thereby, increasing the likelihood that Mr. Ali will be afforded a trial that is both fair and reliable.

Respectfully submitted,

By: 

LCDR BRIAN MIZER, JAGC, USN
MAJ AMY FITZGIBBONS, JAGC, USAR
Detailed Counsel for
Mr. Ali Abdul Aziz Ali
Office of the Chief Defense Counsel
Office of Military Commissions



UNITED STATES OF AMERICA

v.

**KHALID SHEIKH MOHAMMED;
WALID MUHAMMAD SALIH MUBARAK
BIN 'ATTASH;
RAMZI BINALSHIBH;
ALI ABDUL AZIZ ALI;
MUSTAFA AHMED AL HAWSAWI**

D-011

Government Response

to the
Defense Motion for Special Relief for an
Enlargement of Time to File Motions

27 JUNE 2008

1. **Timeliness:** This response is filed within the time allowable by the Military Commissions Trial Judiciary Rules of Court. Contrary to the Defense claim, their Motion was not filed in a timely fashion. The Schedule for Trial and Order dated 9 June 2008 required that all deviations from timelines for hearings or for submission of motions be filed not later than 20 days prior to the date established in the Order. The Defense failed to meet this deadline.
2. **Relief Sought:** The Government respectfully requests the Military Judge deny the Defense Motion for Special Relief for an Enlargement of Time seeking a six to nine month extension to file law motions currently due on 11 July 2008. The Defense request for a six to nine month delay is unreasonable. Should the Court decide to extend the deadline, the Government submits that an extension until 25 July 2008 to file law and discovery motions is more than adequate. The Government further requests that the Court deny the Defense request set forth in paragraph 2a. to cancel the 10 July 2008 session at Guantanamo. As set forth below, there is a great deal that can be accomplished by having the session.
3. **Overview:** Seeking to revisit issues already resolved at the earlier session of this military commission, the defense seeks a briefing schedule in September 2008 that is unnecessary. This request appears to be little more than a further attempt by detailed counsel – whose legal representation has thus far been rejected by the accused – to cultivate a relationship, and is nothing more than an obvious delay tactic. The 10 July session can and should be used to address important issues, such as whether Ramzi Binalshibh and Mustafa Ahmed Al Hawsawi desire – and have appropriately asserted their right – to represent themselves and whether Ali Abdul Aziz Ali has had a change of heart as it relates to his request to represent himself. These issues must be resolved immediately. Obviously, defense counsel for Ali Abdul Aziz Ali cannot unilaterally reverse the on-the-record findings of the military judge relating to that accused's self-representation status. Ali Abdul Aziz Ali now represents himself and standby defense counsel can do no more than advise this court that the issue of self-representation should again be addressed with the accused at the next session. While standby counsel should continue to encourage the accused to accept attorney representation, they cannot unilaterally make a declaration in an email that purports to reverse the judge's findings

regarding self-representation status. The following comment contained in the defense email of 23 June 2008 is particularly problematic: "The defense fully expects that Mr. al Baluchi may seek to proceed pro se while in the courtroom and in the presence of three of the defendants. The Defense further expects that Mr. al Baluchi will move between proceeding pro se and with representation throughout the trial." This is not a valid election with respect to choice of counsel. Accused can either proceed pro se or accept detailed/retained counsel. The rules do not contemplate this disruptive brand of hybrid representation for any reason, much less to accommodate an accused's desire to shield their apparent election of counsel from other co-accused (as suggested in the defense email). This matter needs to be resolved on the record at the next session on 10 July and not through ex parte discussions with the Court as the defense proposes.

4. Burden of Proof: As the moving party, the Defense bears the burden of persuasion. *See* Rule for Military Commissions (RMC) 905(c).

5. Facts:

a. On 4 June 2008, while in Guantanamo, the Government provided the defense for each of the accused a copy of all unclassified papers which accompanied the charges; convening orders; and unclassified statements given by each of the accused. This discovery totaled more than 7,000 pages. A duplicate of that discovery along with classified portions of the statements, consisting of approximately 56 paragraphs, was delivered to the Court Security Officer on 24 June 2008 for delivery to counsel.

b. On 9 June 2008, this Court delivered a Trial Schedule to all parties. As required by paragraph 5 of the Order, the Government provided that Trial Schedule to each of the pro se accused in English on 12 June 2008 and later had it translated into Arabic. That version was served on 17 June 2008. On 18 June 2008, the Government provided Walid Muhammad Salih Mubarak Bin 'Attash, in response to his request, a copy of the Manual for Military Commissions, the Regulation for Trial by Military Commissions, and the Military Commissions Trial Judiciary Rules of Court in Arabic. No other pro se accused has asked for that material.

c. The Prosecution responded to the defense request for medical records in Ramzi BinalShibh's case on 20 June 2008, agreeing to disclose any and all medical records known to the Prosecution from the date the accused was captured to the present, to include the medications prescribed to and used by the accused during the time period that included the initial arraignment (5 June 2008). The Prosecution agreed to turn over all the medical records in two different discovery releases: the first from the time the accused was sent to the custody of the Department of Defense in September of 2006 to the present; and the second release constituting the medical records of the accused from the time of his capture until September of 2006. The second set of records are currently undergoing a classification review and will take longer to disclose than the medical records in the first set.

d. The Prosecution acknowledges that it has not responded to the joint defense request for discovery related to unlawful influence dated 20 May 2008. That does not mean we have ignored it. We have reached out to various government offices in order to respond to the defense request and fully expect to provide the defense with all materials to which they are entitled in discovery. But the Prosecution does not know whether the accused intend to continue with the motion or if the two accused currently represented by detailed counsel want to proceed with it in the event they choose to represent themselves. The 10 July session should also be used to resolve this issue.

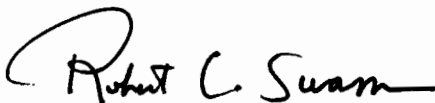
e. On June 23, 2008, standby counsel for Ali Abdul Aziz Ali sent an email notifying all parties that "Mr. al Baluchi has again agreed to be represented by detailed military and civilian counsel." The defense stated that if the military judge wanted additional clarification, they would be willing to provide it ex parte. No civilian counsel has/have entered an appearance on behalf of this accused.

6. **Discussion:** To the extent the Court is inclined to grant an extension, the Prosecution does not oppose a two week delay to file law motions and requests for discovery. The requested delay of six to nine months is patently unreasonable. Moreover, it is unclear to the Prosecution just who is requesting this delay. Throughout the motion, the defense carefully refers to meetings that they have had with "several" of the accused in trying to ascertain what responsibilities standby counsel have to the accused and what roles these accused envision standby counsel and consultants will play. This begs the question whether all accused are on board with the defense request.

7. **Conclusion:** Although the Prosecution takes no position on whether any of these accused should be representing themselves, we point out that – as the military judge has made clear – they have the right to represent themselves. With that comes the requirement that they comply with this Court's schedule. The Prosecution requests that we proceed on track with the 10 July 2008 hearing.

8. **Request for Oral Argument:** The Government does not request oral argument but reserves the right to respond to any oral argument the defense may make.

9. **Respectfully submitted,**



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Office of Military Commissions